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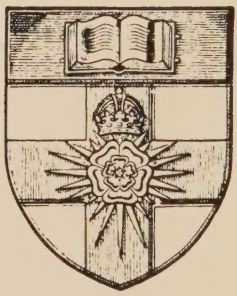

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276	32	affect	effect
352	Foot-note (7)	add 4 D. J. & S. 1.	
361	,, (8)		

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Adams *v.* Thrift – –(C.A.)	21
Ainsworth, *In re.* Finch *v.* Smith – – – –	96
Aldenham School Governing Body, Mariette *v.* *In re* Mariette – – – –	284
Alperton Rubber Company, British Murac Syndicate *v.* –	186
Anglo-Belgian Agency, Société Anonyme Belge des Mines d'Aljustrel (Portugal) *v.* (C.A.)	409
Astle *v.* Wainwright. *In re* Weightman's Settlement –	205
Attorney-General *v.* Shoreditch Corporation – –(C.A.)	154
Ayre, Buchan *v.* – – –	474

B.

Blacklock (H.) & Co. *v.* Pearson (C. Arthur), Ld. – – –	376
Bodega Company *v.* Martin (C.A.)	385
Bowman, *In re.* Secular Society *v.* Bowman – –(C.A.)	447
———, Secular Society *v.* *In re* Bowman – –(C.A.)	447
British Milk Products Company's Application, *In re* –	202
British Murac Syndicate *v.* Alperton Rubber Company –	186
Brown's Claim. *In re* United London and Scottish Insurance Company – – –(C.A.)	167
Buchan *v.* Ayre – – –	474
Burgess, Davies *v.* *In re* Safford's Settlement – – –	211
Burton, *In re.* *In re* Tongue. Higginson *v.* Burton – –	283
———, Higginson *v.* *In re* Tongue. *In re* Burton (C.A.)	283
Bury, Rutland (Duke) *v.* *In re* Marlay – – –(C.A.)	261

C.

	PAGE
Cadbury Brothers' Application, *In re*	307
Cattle Market (Hailsham) Company *v.* Tolman -(C.A.)	1
Chestergate Hat Manufacturing Company, Johnston *v.*	338
Clarkson, *In re.* Public Trustee *v.* Clarkson	216
———, Public Trustee *v.* *In re* Clarkson	216
Clerke, *In re.* Clowes *v.* Clerke	301
———, Clowes *v.* *In re* Clerke	301
Clowes *v.* Clerke. *In re* Clerke	301
Croxon, *In re.* Ferrers *v.* Croxton	290
Croxton, Ferrers *v.* *In re* Croxon	290
Cunliffe, Limond *v.* *In re* Limond	240

D.

Dacre, *In re.* Whitaker *v.* Dacre	480
———, Whitaker *v.* *In re* Dacre	480
Davies *v.* Burgess. *In re* Safford's Settlement	211
Dykes *v.* Tubbs. *In re* Tubbs (C.A.)	137

E.

Elam *v.* Phillips. *In re* Snape	179
Electrical Cooking and Heating Appliances (Venner's) *v.* Thorpe -(C.A.)	404
Elliot, Joicey *v.* *In re* Joicey -(C.A.)	115

F.

Ferrers *v.* Croxton. *In re* Croxon	290
Finance (Industrials) Syndicate *v.* Lind. *In re* Lind -(C.A.)	345
Finch *v.* Smith. *In re* Ainsworth	96

G.

Galloway *v.* Hallé Concerts Society	233
Goswell's Trusts, *In re.*	106

H.

	PAGE
Hailsham Cattle Market Company *v.* Tolman -(C.A.)	1
Hallé Concerts Society, Galloway *v.*	233
Halsey *v.* Wolfe	330
Hat Manufacturing (Chestergate) Company, Johnston *v.*	338
Hay, *In re.* Stanley Gibbons *v.* Hay	198
——, Stanley Gibbons *v.* *In re* Hay	198
Herbert Morris, Ld. *v.* Saxelby (C.A.)	57
Higginson *v.* Burton. *In re* Tongue. *In re* Burton (C.A.)	283
Hooson *v.* Locock. *In re* Stoodley	295
Houghton, *In re.* Houghton *v.* Houghton	173
——— *v.* Houghton. *In re* Houghton	173

I.

Imperial Tobacco Company (of Great Britain and Ireland), Limited's Trade Marks, *In re* (C.A.)	27
Industrials Finance Syndicate *v.* Lind. *In re* Lind (C.A.)	345
Insurance (United London and Scottish) Company, *In re.* Brown's Claim -(C.A.)	167
———, *In re.* Newport Navigation Company's Claim -(C.A.)	12

J.

Johnston *v.* Chestergate Hat Manufacturing Company	338
Joicey, *In re.* Joicey *v.* Elliot (C.A.)	115
——— *v.* Elliot. *In re* Joicey (C.A.)	115

L.

Limond, *In re.* Limond *v.* Cunliffe	240

PAGE

Limond *v.* Cunliffe. *In re* Limond – – – – 240
Lind, *In re.* Industrials Finance Syndicate *v.* Lind –(C.A.) 345
——, Industrials Finance Syndicate *v.* *In re* Lind –(C.A.) 345
Locock, Hooson *v.* *In re* Stoodley – – – – 295
London County Council, South Eastern Railway Company *v.* *In re* South Eastern Railway Company and London County Council's Contract –(C.A.) 252

M.

McLaughlin *v.* McLaughlin. *In re* Nutt's Settlement – – 431
Mallam *v.* Rose – – – 222
Mariette, *In re.* Mariette *v.* Aldenham School Governing Body – – – – 284
——— *v.* Aldenham School Governing Body. *In re* Mariette – – – – 284
Marlay, *In re.* Rutland (Duke) *v.* Bury – – –(C.A.) 264
Martin, Bodega Company *v.* (C.A.) 385
Milk Products (British) Company's Application, *In re* – 202
Morris (Herbert), Ld. *v.* Saxelby (C.A.) 57
Murac (British) Syndicate, Alperton Rubber Company *v.* 186

N.

Navigation (Newport) Company's Claim. *In re* United London and Scottish Insurance Company– – – –(C.A.) 12
Newport Navigation Company's Claim. *In re* United London and Scottish Insurance Company – – (C.A.) 12
Nordberg (J. A.), *In re* – – 439
Nutt's Settlement, *In re.* McLaughlin *v.* McLaughlin – 431

O.

PAGE

Oil and Pipe Line (Premier) Company, Robson *v.* –(C.A.) 124

P.

Pearson (C. Arthur), Ld., Blacklock (H.) & Co. *v.* – – 376
Peruvian Railway Construction Company, *In re* – – – 144
——— *In re* – –(C.A.) 442
Phillips, Elam *v.* *In re* Snape– 179
Premier Oil and Pipe Line Company, Robson *v.* – –(C.A.) 124
Public Trustee *v.* Clarkson. *In re* Clarkson – – – 216
——— *v.* Rogers. *In re* Rogers – – – – 437

R.

Robson *v.* Premier Oil and Pipe Line Company – –(C.A.) 124
Rogers, *In re.* Public Trustee *v.* Rogers – – – – 437
——, Public Trustee *v.* *In re* Rogers – – – – 437
Rose, Mallam *v.* – – – 222
Rubber (Alperton) Company, British Murac Syndicate *v.* – 186
Ruben, *In re* – – – – 313
Rutland (Duke) *v.* Bury. *In re* Marlay – – –(C.A.) 264

S.

Safford's Settlement, *In re.* Davies *v.* Burgess – 211
Saxelby, Herbert Morris, Ld. *v.* (C.A.) 57
Secular Society *v.* Bowman. *In re* Bowman– – –(C.A.) 447
Shoreditch Corporation, Attorney-General *v.* – – –(C.A.) 154
Smith, Finch *v.* *In re* Ainsworth – – – – 96

PAGE

Snape, *In re.* Elam *v.* Phillips 179
Société Anonyme Belge des Mines d'Aljustrel (Portugal) *v.* Anglo-Belgian Agency –(C.A.) 409
South Eastern Railway Company and London County Council's Contract, *In re.* South Eastern Railway Company *v.* London County Council – –(C.A.) 252

v. London County Council. *In re* South Eastern Railway Company and London County Council's Contract –(C.A.) 252
Stanley Gibbons *v.* Hay. *In re* Hay – – – – – 198
Stoodley, *In re.* Hooson *v.* Locock – – – – 295

T.

Thorpe, Venner's Electrical Cooking and Heating Appliances *v.* – – –(C.A.) 404
Thrift, Adams *v.* – –(C.A.) 21
Tolman, Hailsham Cattle Market Company *v.* – –(C.A.) 1
Tongue, *In re. In r* Burton. Higginson *v.* Burton –(C.A.) 283

PAGE

Tubbs, *In re.* Dykes *v.* Tubbs (C.A.) 137
——, Dykes *v.* *In re* Tubbs (C.A.) 137

U.

United London and Scottish Insurance Company, *In re.* Brown's Claim – –(C.A.) 167

——————, *In re.* Newport Navigation Company's Claim – –(C.A.) 12

V.

Venner's Electrical Cooking and Heating Appliances *v.* Thorpe (C.A.) 404

W.

Wainwright, Astle *v.* *In re* Weightman's Settlement – 205
Weaver, Wilkins (Fred.) and Brothers *v.* – – – 322
Weightman's Settlement, *In re.* Astle *v.* Wainwright – – 205
Whitaker *v.* Dacre. *In re* Dacre 180
Wilkins (Fred.) and Brothers *v.* Weaver – – – – 322
Wolfe, Halsey *v.* – – – 330

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Stratten	3 J. & Lat. 603	352
Abergavenny Improvement Commissioners *v.* Straker	42 Ch. D. 83	6
Abrahams *v.* Dimmock	[1915] 1 K. B. 662	332
Adams and Kensington Vestry, In re	27 Ch. D. 394	272
Akerman, In re	[1891] 3 Ch. 212	144, 442, 480
Albert Baker & Co.'s Application, In re	[1908] 2 Ch. 86	307
Alcock *v.* Sloper	2 My. & K. 699	438
Alexander *v.* Automatic Telephone Company	[1900] 2 Ch. 56	237
Allen *v.* Flood	[1898] A. C. 1	105
—— *v.* Gold Reefs of West Africa	[1900] 1 Ch. 656	186, 237
—— *v.* Inland Revenue Commissioners	[1914] 1 K. B. 327; [1914] 2 K. B. 327	392
—— *v.* Taylor	16 Ch. D. 355	223
Andrews *v.* Gas Meter Company	[1897] 1 Ch. 361	190
Apollinaris Company's Trade Marks, In re	[1891] 2 Ch. 186	33
Atkinson, In re	[1892] 3 Ch. 52	216
Attorney-General *v.* Ashton Gas Company	[1904] 2 Ch. 621; [1906] A. C. 10	338
—— *v.* Dodd	[1894] 2 Q. B. 150	107
—— *v.* Lonsdale (Earl)	1 Sim. 105	287
—— *v.* Walthamstow Urban Council	[1910] 1 Ch. 347	88
Auriferous Properties (No. 2), In re	[1898] 2 Ch. 428	144
Austen *v.* Collins	54 L. T. 903	32
Automatic Self-Cleansing Filter Company *v.* Cuninghame	[1906] 2 Ch. 34	195
Aynsley *v.* Glover	L. R. 10 Ch. 283	225

B.

Badische Anilin und Soda Fabrik *v.* Schott, Segner & Co.	[1892] 3 Ch. 447	70
Bailey *v.* Finch	L. R. 7 Q. B. 34	481
Baillie *v.* Oriental Telephone and Electric Company	[1915] 1 Ch. 503	191
Baily *v.* British Equitable Assurance Company	[1904] 1 Ch. 374	186
Bainbridge *v.* Smith	41 Ch. D. 462	186
Baker, In re	44 Ch. D. 262	200
Baldock, In re	48 Sol. J. 492	118

		PAGE
Ballard *v.* Marsden	14 Ch. D. 374	98
Bank für Handel und Industrie, In re	[1915] 1 Ch. 848	316
Barrance, In re	[1910] 2 Ch. 419	297
Bate *v.* Hooper	5 D. M. & G. 338	99
Bateson's Estate, In re	[1895] 2 I. R. 559	270
Battishill *v.* Reed	18 C. B. 696	226
Belding *v.* Read	3 H. & C. 955	352
Bentham, In re	94 L. T. 307	438
Benz et Cie.'s Application, In re	29 Rep. Pat. Cas. 357; 30 Rep. Pat. Cas. 177	310
Besant, In re	11 Ch. D. 508	454
Bidder and North Staffordshire Railway Company, In re	4 Q. B. D 412	260
Biggs *v.* Peacock	22 Ch. D. 284	114
Birmingham Corporation *v.* Foster	70 L. T. 371	5
Black *v.* Scottish Temperance Life Assurance Company	[1908] 1 I. R. 541	226
Blake *v.* Lanyon	6 T. R. 221	322
Bodega Company *v.* Read	[1914] 2 Ch. 757	385
Bousfield *v.* Lawford	1 D. J. & S. 459	482
Boussmaker, Ex parte	13 Ves. 71	128
Bradley and Essex and Suffolk Accident Indemnity Society, In re	[1912] 1 K. B. 415	169
Brearley *v.* Morley	[1899] 2 Q. B. 121	158
Bridger, In re	[1894] 1 Ch. 297	182
Briggs, In re	7 Times L. R. 572	200
——— *v.* Hartley	19 L. J. (Ch.) 416	447
British and American Trustee and Finance Company *v.* Couper	[1894] A. C. 399	237
British Association of Glass Bottle Manufacturers *v.* Nettlefold	27 Times L. R. 527	452
British Equitable Assurance Company *v.* Baily	[1906] A. C. 35	190
British Westinghouse and Electric Manufacturing Company *v.* Underground Electric Railways Company of London	[1912] A. C. 673	341
Brock (H. N.) & Co., In re	[1910] 1 Ch. 130	32
Brocklebank *v.* Johnson	20 Beav. 205	298
Brown & Gregory, In re	[1904] 1 Ch. 627; [1904] 2 Ch. 448	144, 148
——— *v.* Bateman	L. R. 2 C. P. 272	352
Brudenell *v.* Elwes	1 East, 442; 7 Ves. 382	208

C.

California Fig Syrup Company, In re	[1910] 1 Ch. 130	204
Campbell *v.* Campbell	4 Bro. C. C. 15	218
Cannon v. Trask	L. R. 20 Eq. 669	191
Carpenter's Estate, In re	50 Am. St. Rep. 765	176
Carr *v.* Allatt	27 L. J. (Ex.) 385	361
Carringtons *v.* Smith	[1906] 1 K. B. 79	332
Cary *v.* Abbot	7 Ves. 490	454
Cave *v.* Cave	8 D. M. & G. 131	213
Charlesworth, In re	[1910] W. N. 18	287
Chatterton *v.* Cave	L. R. 10 C. P. 572; 3 App. Cas. 483	379

		PAGE
Cherry *v.* Boultbee	4 My. & Cr. 442	144, 442, 480
Chester *v.* Chadwick	13 Sim. 102	118
Chilton *v.* Progress Printing and Publishing Company	[1895] 2 Ch. 29	379
City and South London Railway Company and St. Mary Woolnoth and St. Mary Woolchurch Haw, In re	[1903] 2 K. B. 728	257
Clarke, In re	35 Ch. D. 109; 36 Ch. D. 348	350
——, In re	[1901] 2 Ch. 110	287
—— *v.* Thornton	35 Ch. D. 307	139
Cleaver *v.* Mutual Reserve Fund Life Association	[1892] 1 Q. B. 147	171
Clément & Cie.'s Trade Mark, In re	[1900] 1 Ch. 114	309
Clough *v.* Samuel	[1905] A. C. 442	350
Cole *v.* Kernot	L. R. 7 Q. B. 534, n.	349
Coles *v.* Accident Insurance Company	5 Times L. R. 736	169
Collins *v.* Doyle	1 Russ. 135	270
Colls *v.* Home and Colonial Stores	[1904] A. C. 179	227
Collyer *v.* Isaacs	19 Ch. D. 342	345
Constable *v.* Constable	11 Ch. D. 681	182
Cooper *v.* Martin	L. R. 3 Ch. 47	213
Coote *v.* O'Reilly	1 J. & Lat. 455	293
Corrie *v.* MacDermott	[1914] A. C. 1056	257
Cory (William) & Son *v.* Harrison	[1906] A. C. 274	63
Cosmopolite, The	4 C. Rob. 8	131
Cowan *v.* Milbourn	L. R. 2 Ex. 230	447
Crippen, In the Estate of	[1911] P. 108	174
Croker's Estate, In re	[1913] 1 I. R. 522	270
Crooke *v.* De Vandes	9 Ves. 197	218
Croxon, In re	[1904] 1 Ch. 252	32

D.

Davies *v.* Goodhew	6 Sim. 585	109
Davis *v.* Bennet	30 Beav. 226	298
—— *v.* Marrable	[1913] 2 Ch. 421	227
Dearberg *v.* Letchford	72 L. T. 489	431
Debney *v.* Eckett	43 W. R. 54	140
De Bussche *v.* Alt	8 Ch. D. 286	118
De Costa *v.* De Paz	2 Swans. 487, n.; Amb. 228	452
Deering *v.* Bank of Ireland	12 App. Cas. 20	355
De Francesco *v.* Barnum	63 L. T. 514	322
Dent *v.* Auction Mart Company	L. R. 2 Eq. 238	227
De Themmines *v.* De Bonneval	5 Russ. 288	454
Dexter's Application, In re	[1893] 2 Ch. 262	33
Dibbs *v.* Goren	11 Beav. 483	98
Dixon *v.* Pyner	55 L. J. (Ch.) 566; 54 L. T. 748; 34 W. R. 528	208
Doe *v.* Mills	1 Moo. & R. 288	247
Doering *v.* Doering	42 Ch. D. 203	480
Donald, In re	[1909] 2 Ch. 410	287
Doyle's Estate, In re	[1907] 1 I. R. 204	270
Drummond, In re	[1914] 2 Ch. 90	287
Dubowski & Sons *v.* Goldstein	[1896] 1 Q. B. 478	70
Du Cros' (W. & G.) Applications, In re	[1912] 1 Ch. 644	35
Dyson *v.* Attorney-General	[1912] 1 Ch. 158	237

E.

		PAGE
Eagle *v.* Charing Cross Railway Company	L. R. 2 C. P. 638	256
Eastes *v.* Russ	[1914] 1 Ch. 468	63
Eden *v.* North Eastern Railway Company	[1907] A. C. 400	256
Edwards *v.* West	7 Ch. D. 858	269
Egerton's (Lady) Case	Cited in Duke on Charitable Trusts, p. 127	452
Ellis & Co.'s Trade Mark, In re	21 Rep. Pat. Cas. 617	34
Elwes *v.* Payne	12 Ch. D. 468	5
Emanuel *v.* Constable	3 Russ. 436	247
Emuss *v.* Smith	2 De G. & Sm. 722	269
Eno *v.* Dunn	15 App. Cas. 252	312

F.

Farbenfabriken Application, In re	[1894] 1 Ch. 645	204
Faulder & Co.'s Trade Mark, In re	[1902] 1 Ch. 125	310
Fauntleroy's Case	4 Bli. (N.S.) 194	174
Fearon *v.* Mitchell	L. R. 7 Q. B. 690	5
Felstead *v.* Rex	[1914] A. C. 534	174
Fieldings *v.* Coventry	Collard's Money-lenders Acts, App. D. 227.	332
——— *v.* Pawson	Collard's Money-lenders Acts, App. D. 228.	332
Finlay *v.* Chirney	20 Q. B. D. 494	355
Finnemor's Estate, In re	[1913] 1 I. R. 130	270
Fisher *v.* Black and White Publishing Company	[1901] 1 Ch. 174	341
Fletcher *v.* Ashburner	1 Bro. C. C. 497; 1 Wh. & T. L. C., 8th ed. p. 347	272
Folsom *v.* Marsh	2 Story, 100	379
Foster *v.* Banbury	3 Sim. 40	247
Fraser *v.* Murdoch	6 App. Cas. 855	100
Frewen *v.* Philipps	11 C. B. (N.S.) 449	225

G.

Gattward *v.* Knee	[1902] P. 99	245
Gedney, In re	[1908] 1 Ch. 804	150
German Date Coffee Company, In re	20 Ch. D. 169	459
Girdlestone *v.* Doe	2 Sim. 225	304
Gist *v.* Mason	1 T. R. 84	134
Goldsoll *v.* Goldman	[1915] 1 Ch. 292	71
Good, In re	[1905] 2 Ch. 60	287
Gordon *v.* Atkinson	1 De G. & Sm. 478	218
Goy & Co., In re	[1900] 2 Ch. 149	144
Grant, In re	52 L. J. (Ch.) 552	293
Great Eastern Railway Company *v.* Goldsmid	25 Ch. D. 511; 9 App. Cas. 927	6
Great Ship Company, In re	4 D. J. & S. 63	406
Greenslade, In re	[1915] 1 Ch. 155	118
Greenway *v.* Greenway	2 D. F. & J. 128	304
Gregson, In re	36 Ch. D. 223	147

		PAGE
Grey *v.* Kentish	1 Atk. 280	370
—— *v.* Pearson	6 H. L. C. 61	396
Grissell's Case	L. R. 1 Ch. 528	150
Griswold *v.* Waddington	16 Johnson (New York), 438	129
Grover & Grover *v.* Mathews	[1910] 2 K. B. 401	14
Guaglieni *v.* Matthews	6 B. & S. 474; 34 L. J. (M.C.) 116	158

H.

Hall, In the Estate of	[1914] P. 1	174
Hallett *v.* Hallett	13 Ch. D. 232	147
Hallett's Estate, In re	13 Ch. D. 696	481
Harbidge *v.* Warwick	3 Ex. 552	222
Harding, In re	[1894] 3 Ch. 315	208
———— *v.* Board of Land and Works	11 App. Cas. 208	256
Hardoon *v.* Belilios	[1901] A. C. 118	476
Hardwicke (Earl) *v.* Douglas	7 Cl. & F. 795	295
Hardy *v.* Fothergill	13 App. Cas. 351	349
Harris *v.* Clarson	27 Times L. R. 30	332
——— *v.* Davis	1 Coll. 416	304
——— *v.* Harris (No. 2)	29 Beav. 110	98
Harrison *v.* Evans	Sketch of History and Proceedings of Delegates appointed to protect the Civil Rights of Protestant Dissenters, p. 31; App. to Furneaux's Letters to Mr. Justice Blackstone (2nd ed.)	452
Harvey *v.* Rex	[1901] A. C. 601	175
Hasluck *v.* Pedley	L. R. 19 Eq. 271	182
Hay *v.* Tower Division Justices	24 Q. B. D. 561	176
Haynes *v.* Doman	[1899] 2 Ch. 13	64
——— *v.* Ford	[1911] 2 Ch. 237	5
Hearle *v.* Hicks	1 Cl. & F. 20	295
Hendriks *v.* Montagu	17 Ch. D. 638	204
Herbert *v.* Herbert	Deane's Rep. 11	245
Hill *v.* Clifford	[1907] 2 Ch. 236	175
Hill's Trade Mark, In re	10 Rep. Pat. Cas. 113	35
Hiscock, In the Goods of	[1901] P. 78	245
Hitchcock *v.* Coker	6 Ad. & E. 438	70
Hodgkinson *v.* Fernie	3 C. B. (N.S.) 189	341
Hodgson, In re	9 Ch. D. 673	152, 444
Holliday *v.* Overton	15 Beav. 480	433
Holroyd *v.* Marshall	10 H. L. C. 191	350
Holt *v.* Gas Light and Coke Company	L. R. 7 Q. B. 728	256
Homer *v.* Ashford	3 Bing. 322	74
Honywood *v.* Honywood	[1902] 1 Ch. 347	292
Hood *v.* Clapham	19 Beav. 90	98
Hoop, The	1 C. Rob. 196	129
Horne, In re	[1905] 1 Ch. 76	96
Hotchkys, In re	32 Ch. D. 408	139
Howe *v.* Dartmouth (Earl)	7 Ves. 137a	437
Hudson, In re	72 L. T. 892	434
Huskisson *v.* Lefevre	26 Beav. 157	107
Hyams *v.* Stuart King	[1908] 2 K. B. 696	457
Hyman *v.* Van Den Bergh	[1907] 2 Ch. 516; [1908] 1 Ch. 167	225

I.

		PAGE
Ibbetson, In re	88 L. T. 461	303
Illingworth, In re	[1909] 2 Ch. 297	211
Imperial Marine Insurance Company *v.* Fire Insurance Corporation	4 C. P. D. 166	14
Incorporated Society *v.* Richards	1 D. & War. 258	287
Ingram *v.* Ingram	2 Atk. 88	118
Inland Revenue Commissioners *v.* Forrest	15 App. Cas. 334	452
——— *v.* Glasgow and South Western Railway Company	12 App. Cas. 315	256
Institution of Civil Engineers, In re	20 Q. B. D. 621; 15 App. Cas. 334	452
Irwin, In re	[1904] 2 Ch. 752	434
Isaac, In re	[1905] 1 Ch. 427	298
Isaacs, In re	[1894] 3 Ch. 506	265
Isle of Wight Railway Company *v.* Tahourdin	25 Ch. D. 320	191

J.

Jacubs *v.* Rylance	L. R. 17 Eq. 341	480
James *v.* Buena Ventura Nitrate Grounds Syndicate	[1896] 1 Ch. 456	190
Johnson *v.* Barton	O'Connor M.R., Jan. 12, 1915. Not reported	270
Jones *v.* Bailey	[1910] 1 I. R. 110	270
——— *v.* Ogle	L. R. 14 Eq. 419; L. R. 8 Ch. 192	182

K.

Keay *v.* Boulton	25 Ch. D. 212	303
Kenrick & Co. *v.* Lawrence & Co.	25 Q. B. D. 99	379
Kenward, In re	94 L. T. 277	198
Kermode *v.* Macdonald	L. R. 1 Eq. 457	298
Kershaw *v.* Kelsey	100 Mass. Rep. 561	134
King *v.* Cadogan (Earl)	[1915] 1 K. B. 821	403
King-Sampson *v.* King-Sampson	[1866] W. N. 78	438
Kodak *v.* London Stereoscopic and Photographic Company	20 Rep. Pat. Cas. 337	204

L.

Ladyman *v.* Grave	L. R. 6 Ch. 763	225
Lamb *v.* Evans	[1893] 1 Ch. 218	88
Latham *v.* Travers	[1912] 1 I. R. 140	273
Law Car and General Insurance Corporation, In re	[1913] 2 Ch. 103	13
Lawes *v.* Bennett	1 Cox, 167	265
Lawrence *v.* Smith	Jac. 471	453
Leather Cloth Company *v.* Lorsont	L. R. 9 Eq. 345	74
Lee *v.* Delane	4 De G. & Sm. 1	298
Leeds and Hanley Theatres of Varieties, In re	[1904] 2 Ch. 45	144, 444
Lees *v.* Summersgill	17 Ves. 508	247

		PAGE
Leetham (Henry) & Sons *v.* Johnstone-White	[1907] 1 Ch. 189, 322	63
Legard *v.* Hodges	1 Ves. Jun. 477	373
Leng (Sir W. C.) & Co. *v.* Andrews	[1909] 1 Ch. 763	63
Leslie *v.* Young (J.) & Sons	[1894] A. C. 335	379
Levene *v.* Greenwood	20 Times L. R. 389	332
Livesey *v.* Livesey	3 Russ. 287	98
Llandaff and Canton District Market Company *v.* Lyndon	8 C. B. (N.S.) 515	6
Llynvi Coal and Iron Company, Ex parte	L. R. 7 Ch. 28	351
Lucas *v.* Brandreth (No. 2)	28 Beav. 274	433
Lumley *v.* Gye	2 E. & B. 216	326
Lyde *v.* Mynn	1 My. & K. 683	350
Lysaght *v.* Edwards	2 Ch. D. 499	272

M.

McClure's Trusts, In re	[1906] W. N. 200; 76 L. J. (Ch.) 52	139
M'Connell *v.* Hector	3 Bos. & P. 113	418
Macfarlane's Claim	17 Ch. D. 337	13
McGlennon's Application, In re	25 Rep. Pat. Cas. 797	32
M'Glother *v.* Provident Mutual Accident Company	89 Fed. Rep. 685	169
Mallan *v.* May	11 M. & W. 653	70
Malleson *v.* National Insurance and Guarantee Corporation	[1894] 1 Ch. 200	190
March, In re	27 Ch. D. 166	182
Marshall *v.* Graham	[1907] 2 K. B. 112	460
Martin *v.* Hobson	L. R. 8 Ch. 401	270
Mason *v.* Provident Clothing and Supply Company	[1913] A. C. 724	63
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630	87
Meek *v.* Kettlewell	1 Ph. 342	352
Merchant Banking Company of London *v.* Merchants' Joint Stock Bank	9 Ch. D. 560.	204
Metcalfe *v.* York (Archbishop)	1 My. & Cr. 547	357
Michaelson *v.* Nichols	26 Times L. R. 327	333
Michel's Trust, In re	28 Beav. 39	455
Millers *v.* Steedman	31 Times L. R. 205	70
Millwood Colliery Company, Ex parte	24 W. R. 898	406
Mitchel *v.* Reynolds	1 P. Wms. 181	74
Mitchell *v.* Cantrill	37 Ch. D. 56	225
Mogul Steamship Company *v.* McGregor, Gow & Co.	[1892] A. C. 25	471
Monckton's Settlement, In re	[1913] 2 Ch. 636	431
Mooney's Estate, In re	[1911] 1 I. R. 125	273
Morgan *v.* De Britten	L. R. 13 Eq. 28	218
——— *v.* Fear	[1907] A. C. 425	225
Morier, Ex parte	12 Ch. D. 491	482
Morley *v.* Bird	3 Ves. 628	218
Moses, In re	[1902] 1 Ch. 100	213
Mudge, In re	[1914] 1 Ch. 115	370
Murray *v.* Benbow	Byron's Works, ed. 1837, p. 317; Jac. 474, n.	453

N.

		PAGE
Nevanas (S. V.) & Co. *v.* Walker	[1914] 1 Ch. 413	63
Newell *v.* National Provincial Bank of England	1 C. P. D. 496	147
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Company	[1893] 1 Ch. 630; [1894] A. C. 535	63, 70
North Yorkshire Iron Company, In re	7 Ch. D. 661	406
Nottage, In re	[1895] 2 Ch. 649	287

O.

O'Grady's Settlement, In re	[1915] 1 Ch. 39	107
Oliver *v.* Hinton	[1899] 2 Ch. 264	105
Oliver's Settlement, In re	[1905] 1 Ch. 191	433
Orenstein *v.* Koppel	52 Sc. L. R. 54	129
Orpen, In re	16 Ch. D. 202	152, 444

P.

Paine & Co. *v.* Daniells & Sons' Breweries	[1893] 2 Ch. 567	33
Palace Hotel, In re	[1912] 2 Ch. 438	441
Panariellos, The	138 L. T. Journ. 484	129
Pankhurst *v.* Thompson	3 Times L. R. 199	454
Parkin *v.* Knight	15 Sim. 83	303
Parsons *v.* Parsons	L. R. 8 Eq. 260	303
Part *v.* Bond	93 L. T. 49	333
Paul *v.* Travelers Insurance Company	112 N. Y. 472; 8 Am. St. Rep. 758	169
Pearce *v.* Bastable's Trustee	[1901] 2 Ch. 122	351
——— *v.* Brooks	L. R. 1 Ex. 213	454
Perkins Beach Lead Mining Company, In re	7 Ch. D. 371	406
Peruvian Railway Construction Company, In re	[1915] 2 Ch. 144, 442	481
Phillimore *v.* Machon	1 P. D. 481	458
Pickett *v.* Pacific Mutual Insurance	144 Pa. St. 79; 27 Am. St. Rep. 618	169
Pike *v.* Nicholas	L. R. 5 Ch. 251	379
Pitcairn, In re	[1896] 2 Ch. 199	438
Popham, In re	[1914] W. N. 257; 111 L. T. 524	293
Porter *v.* Freudenberg	[1915] 1 K. B. 857	134
Powell's Trade Mark, In re	[1893] 2 Ch. 388	35
Preston *v.* Grand Collier Dock Company	11 Sim. 327	238
Prince *v.* Cooper	17 Beav. 187	290
Prince of Wales, &c., Association *v.* Palmer	25 Beav. 605	175
Printing and Numerical Registering Company *v.* Sampson	L. R. 19 Eq. 462	82
Pugh *v.* Drew	17 W. R. 988	433
Pullan *v.* Koe	[1913] 1 Ch. 9	373
Punt *v* Symons & Co.	[1903] 2 Ch. 506	186
Pyle, In re	[1895] 1 Ch. 724	270

Q.

		PAGE
Quaglieni *v.* Matthews	6 B. & S. 474; 34 L. J. (M.C.) 116	158
Quinn *v.* Leathem	[1901] A. C. 495	105, 326

R.

Randfield *v.* Randfield	32 L. J. (Ch.) 668	248
Rayer, In re	[1903] 1 Ch. 685	182
Read *v.* Snell	2 Atk. 642	304
Rees *v.* Watts	11 Ex. 410	146, 482
Reeve *v.* Whitmore	33 L. J. (Ch.) 63; 4 D. J. & S. 1	352
Reg. *v.* Bradlaugh	15 Cox, C. C. 217	454
—— *v.* Hetherington	4 St. Tr. (N.S.) 590	457
—— *v.* Ramsay	15 Cox, C. C. 231	454
—— *v.* Tucker	2 Q. B. D. 417	158
Registrar of Trade Marks *v.* W. & G. Du Cros	[1913] A. C. 624	203
Reis, In re	[1904] 2 K. B. 769; [1905] A. C. 442	350
Rex *v.* Boulter	72 J. P. 188	454
—— *v.* Carlile	3 B. & Al. 161	457
—— *v.* London County Council	[1915] W. N. 103, 154	129
—— *v.* Registrar of Companies	[1912] 3 K. B. 23	204
—— *v.* Taylor	[1915] 2 K. B. 709	174
—— *v.* Waddington	1 B. & C. 26	452
Rhodesia Goldfields, In re	[1910] 1 Ch. 239	144, 444
Richardson, In re	[1896] 1 Ch. 512	100
—— *v.* Graham	[1908] 1 K. B. 39	227
Rivière's Trade Mark, In re	26 Ch. D. 48	34
Robinson, In re	[1911] 1 Ch. 502	99
—— *v.* Ommanney	21 Ch. D. 780; 23 Ch. D. 285	352
Rogers *v.* Ingham	3 Ch. D. 351	99
—— *v.* Maddocks	[1892] 3 Ch. 346	71
Roundwood Colliery Company, In re	[1897] 1 Ch. 373	405
Rousillon *v.* Rousillon	14 Ch. D. 351	69
Royal Warrant Holders' Association *v.* Edward Deane & Beal	[1912] 1 Ch. 10	32
—— *v.* Slade & Co.	25 Rep. Pat. Cas. 245	32
Royal Worcester Corset Company's Application, In re	[1909] 1 Ch. 459; 26 Rep. Pat. Cas. 185	32
Russell *v.* Jackson	10 Hare, 204	460

S.

Samuel *v.* Burton	Collard's Money-lenders Acts, App. D. 366.	332
—— *v.* Newbold	[1906] A. C. 461	332
Saunders, In the Goods of	L. R. 1 P. & M. 16	245
Schweppes, In re	[1914] 1 Ch. 322	441
Scott *v.* Rhodes	1 Phill. 12	248
Senior *v.* Metropolitan Railway Company	2 H. & C. 258	256
Shackell & Co. *v.* Chorlton & Sons	[1895] 1 Ch. 378	405

		PAGE
Sherlock's Estate, In re	[1899] 2 I. R. 561	270
Shipperdson *v.* Tower	1 Y. & C. Ch. 441	298
Shore *v.* Wilson	9 Cl. & F. 355	453, 457
Simmons *v.* Simmons	39 Sol. J. 673	476
Simper *v.* Foley	2 J. & H. 555	225
Skull *v.* Glenister	16 C. B. (N.S.) 81	226
Smith, In re	42 Ch. D. 302	100
——— *v.* Lucas	18 Ch. D. 531	373
——— *v.* White	L. R. 1 Eq. 626	454
Smokeless Powder Company's Trade Mark, In re	[1892] 1 Ch. 590	309
Sparenburgh *v.* Bannatyne	1 Bos. & P. 163	134
Stebbing *v.* Metropolitan Board of Works	L. R. 6 Q. B. 37	237
Steele, In re	[1913] 1 I. R. 292	270
Stephenson *v.* Dowson	3 Beav. 342	270
Stevens *v.* Hoare	20 Times L. R. 409	22
Straus *v.* Goldsmid	8 Sim. 614	455
Sykes *v.* Sheard	33 Beav. 114	107

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	350
Talbot *v.* Frere	9 Ch. D. 568	146
Tallis *v.* Tallis	1 E. & B. 391	70
Tapling *v.* Jones	11 H. L. C. 290	225
Taylor *v.* Timson	20 Q. B. D. 671	452
Taylor's Settlement, In re	9 Hare, 596	107
Temple Press *v.* McNab	Unreported	75
Thomas, In re	[1900] 1 Ch. 319	140
——— *v.* Ashbrook (Lord)	[1913] 2 I. R. 416	332
——— *v.* Turner	33 Ch. D. 292	379
Thompson *v.* Cohen	L. R. 7 Q. B. 527	349
——— *v.* Thompson	1 Coll. 395	454
Thorne (H. E.) & Son, In re	[1914] 2 Ch. 438	148
——— (R.) & Sons, Ld. *v.* Pimms, Ld.	26 Rep. Pat. Cas. 221	35
Thornton *v.* Hawley	10 Ves. 129	107
——— *v.* Howe	31 Beav. 14	454
Thursby's Settlement, In re	[1910] 2 Ch. 181	433
Townley *v.* Bedwell	14 Ves. 591	272
Trade Auxiliary Company *v.* Middlesborough and District Tradesmen's Protection Association	40 Ch. D. 425	378
Trego *v.* Hunt	[1896] A. C. 7	90
Trevor *v.* Whitworth	12 App. Cas. 409	455
Tringham's Trusts, In re	[1904] 2 Ch. 487	433
Turnbull, In re	[1905] 1 Ch. 726	179
Tweedale, In the Goods of	L. R. 3 P. & M. 204	245

U.

Underwood (E.) & Son *v.* Barker	[1899] 1 Ch. 300	70
Upfill *v.* Wright	[1911] 1 K. B. 506	452, 454

V.

Venbrynen *v.* Wilson	9 East, 321	134

W.

		PAGE
Walker *v.* London Tramways Company	12 Ch. D. 705	190
Walsh's Estate, In re	MacCarthy's Land Purchase Cases, 100	270
Warburton *v.* Loveland	1 Hud. & B. 623	396
Ward *v.* Byrne	5 M. & W. 548	70
Watney, Combe, Reid & Co. *v.* Berners	[1914] 2 Ch. 757; [1915] A. C. 885	398
Weatherby & Sons *v.* International Horse Agency and Exchange	[1910] 2 Ch. 297	378
Weeding *v.* Weeding	1 J. & H. 424	273
Wells *v.* Joyce	[1905] 2 I. R. 134	332
West *v.* Sutton	1 Salk. 2	134
West Coast Gold Fields, In re	[1905] 1 Ch. 597; [1906] 1 Ch. 1	144, 149, 444
Wheeldon v. Burrows	12 Ch. D. 31	223
White *v.* Commissioners of H. M. Works and Public Buildings	22 L. T. 591	260
——— *v.* Grane	18 Beav. 571	118
Wigan *v.* Rowlands	11 Hare, 157	248
Wilkie's Settlement, In re	[1914] 1 Ch. 77	139
Williams *v.* Paine	169 Sup. Ct. Rep. U. S. 55	134
Wiltshire *v.* Willett	11 C. B. (N.S.) 240	6
Wingfield *v.* Wingfield	9 Ch. D. 658	303
Woodside *v.* Globe Marine Insurance Company	[1896] 1 Q. B. 105	14
Wright, Crossley & Co.'s Trade Mark, In re	15 Rep. Pat. Cas. 131	34

Y.

York, In re	36 Ch. D. 233	198

Z.

Zonophone Registered Trade Mark, In re	20 Rep. Pat. Cas. 450	35

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

HAILSHAM CATTLE MARKET COMPANY *v.* TOLMAN.

C. A.
1915
April 26, 27.

[1914 H. 1813.]

Market—Statutory Market—Disturbance—Exception in case of Sales "on any land or in any building belonging" to a Seller "or in his occupation"—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict.* c. 14), *s.* 13.

By a private Act, passed in 1871, incorporating certain statutes, including the Markets and Fairs Clauses Act, 1847 (except where expressly varied by the private Act), the plaintiffs were incorporated, the limits of operation of the Act were defined, and the company were empowered to continue, establish, and maintain a market for the sale of certain animals. By s. 42 every person who should, on the days appointed for holding markets, within the limits of the Act sell or expose for sale at any place within those limits, "except on any land or in any building belonging to him or in his occupation," any animals, in respect of which tolls were by the Act authorized to be taken, should forfeit and pay to the company any sum not exceeding forty shillings, unless he should have paid the tolls authorized. By s. 13 of the Act of 1847, after the market place of a market under a special Act is opened for public use, every person other than a licensed hawker who sells or exposes for sale in any place within the prescribed limits "except in his own dwelling-place or shop" any articles in respect of which tolls are by the special Act authorized to be taken in the market is for every offence liable to a penalty not exceeding forty shillings. The plaintiffs' markets were held on every alternate Wednesday, and sales took place there both by auctioneers and through private bargains by the frequenters of the market. The defendant acquired and occupied land within the limits

C. A.
1915
HAILSHAM CATTLE MARKET COMPANY v. TOLMAN.

of the private Act, on which he erected buildings which were used for animals in respect of which tolls were payable when sold in the plaintiffs' market, and for selling purposes. In one building there were a ring for showing the cattle and a rostrum, and in the open there were pens for the animals. On these premises the defendant held auction sales of animals every third Tuesday. The sales were attended by several persons who attended the plaintiffs' market, but there was no private bargaining among those who attended the sales :—

Held, on the construction of s. 42 of the private Act, which superseded s. 13 of the Act of 1847, that the defendant had not done anything which he was prohibited from doing.

Decision of Sargant J. [1915] 1 Ch. 360 affirmed.

APPEAL from a decision of Sargant J. (1)

By a private Act, the Hailsham Cattle Market Act, 1871 (34 & 35 Vict. c. l.), after reciting that a company had been incorporated under the Companies Act, 1862, for the purpose of providing, and had provided, a new cattle and live stock market at Hailsham by the name of the Hailsham Cattle Market Company, Limited, and that the company were willing and it was expedient that they should be empowered to continue and maintain the cattle market in the parish of Hailsham, in that Act described, under proper regulations and management, it was amongst other things enacted as follows :

By s. 2 of the Act various Consolidation Acts, including the Markets and Fairs Clauses Act, 1847, were (except where expressly varied by the private Act) incorporated with and formed part of the private Act. By s. 3 an extended meaning was given to the word "cattle" so as to include bulls, oxen, cows, heifers and calves, rams, wethers, ewes and lambs, and swine, and an extended meaning was also given to the word "horses." By certain other sections the plaintiff company were incorporated and the property of the limited company was vested in the plaintiff company, and provisions were made for the plaintiff company standing in all respects in the shoes of the limited company. By s. 39 the limits within which the private Act might be put into force were to be co-extensive with the parish of Hailsham except that portion of the parish which was within the liberty of Pevensey. By s. 40 "subject to the provisions of this Act" the company were empowered to continue, establish, and maintain a market for the

(1) [1915] 1 Ch. 360.

sale of cattle and horses with all proper conveniences. Sect. 42 was as follows:

"Every person who shall on the days hereby appointed or to be appointed for holding markets within the limits of this Act sell, let, or expose for sale or letting, at any place within the limits of this Act, except on any land or in any building belonging to him or in his occupation, any horses, cattle, sheep, pigs, or other live stock in respect of which tolls are by this Act authorised to be taken, shall forfeit and pay to the Market Company any sum not exceeding forty shillings, unless he or they shall pay or have paid the tolls by this Act authorized to be taken."

By s. 43 a market was to be held by the company on such week-days with one or two exceptions and within such hours as the company should from time to time appoint, provided that until the company should otherwise appoint the market should be held on the day on which it was then held. And by s. 45 the company were empowered to take tolls from persons bringing any cattle or horses into the market for sale or exhibition.

Sect. 13 of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), is as follows: "After the market place is opened for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

Prior to the passing of the private Act the market at Hailsham had been held on alternate Wednesdays. This practice was continued by the plaintiff company under the private Act without variation down to the present time. The market accommodation there was sufficient. Sales took place there through the agency of two auctioneers as well as by private bargain amongst those frequenting the market.

The defendant agreed early in 1914 to buy some land lying in the parish of Hailsham, outside the liberty of Pevensey, and adjoining the Polegate station of the London, Brighton and South Coast Railway; and in April last this land was conveyed to him. After the agreement and prior to the conveyance he

C. A. 1915

HAILSHAM CATTLE MARKET COMPANY v. TOLMAN.

was let into possession of the land. He had since erected three corrugated iron covered buildings on the land, of which one was used for fat stock, the second for cows with calves, and the third for selling purposes. In the third building were a ring in which the cattle were exhibited at the time of sale, and a rostrum. Besides these buildings there were also iron pens in the open for show cattle and for sheep and pigs. On these premises the defendant held auction sales every third Tuesday, so that once in six weeks his sale would be held on the day preceding the plaintiff company's market day. He advertised his sales in the local newspapers and in the course of doing so described the premises in the first instance as the Polegate Cattle Market, and he also sent round entry forms to farmers and other likely vendors. The sales at the defendant's premises were of a fairly extensive character, and were attended by several at least of those who attended the plaintiff company's market.

There was no evidence, however, that any sales took place by private bargain between the frequenters of the sale or otherwise than through the medium of the auctions. The defendant was always present taking an active part in the proceedings, though a clerk of his was the actual auctioneer.

In the present action the plaintiff company claimed a declaration that they were entitled to the exclusive right of holding markets for the sale of cattle and horses and for such animals other than cattle and horses, and such commodities and things for which markets might be held and tolls taken under the powers conferred by the private Act within the parish of Hailsham (except the portion of the parish which was within the liberty of Pevensey); and an injunction to restrain the defendant, his servants and agents, from establishing a market at Polegate, or from using any premises within the part of the parish not within that liberty as a market, or permitting the same to be used in such a manner as to interfere with or prejudicially affect the rights of the plaintiffs to the said market as thereinbefore declared, and from advertising or causing to be advertised any portion of those premises as a market or as a place used or to be used in any such manner as to interfere with or prejudicially affect the rights of the plaintiffs. They also claimed damages.

The action was tried on November 16 and 17, 1914, and was dismissed by Sargant J. (1)

The plaintiffs appealed.

Martelli, K.C., and *W. A. Casson*, for the appellants. The respondent has set up a rival market and we are entitled to an injunction restraining him from doing so. Sect. 13 of the Markets and Fairs Clauses Act, 1847, is superseded by s. 42 of our private Act of 1871, and neither of those sections deals with this question. They refer to sales on a man's own premises and the difference between them is caused by the necessity of providing for the sale of cattle, which are not as a rule sold in a "dwelling place or shop." Therefore s. 42 speaks of "on any land or in any building." Our common law remedies are not affected as regards all days which are not market days. The private Act deals only with individual sales and not with the setting up of a rival market. Sect. 42 imposes a fine and thereby impliedly prohibits the sale of marketable articles in the parish on market days, and the exception is an exception from that prohibition; it does not apply to other days and it does not affect our common law rights. It gives a narrower protection than s. 13, but it does not justify all sales on a man's own land, as well as those on market days. It must be borne in mind that it is not every sale that is a disturbance of the market, and there may be a disturbance without a sale; we have a statutory right to this market, and what the respondent is doing amounts to a disturbance of that right and ought to be restrained by injunction: *Fearon* v. *Mitchell* (2); *Birmingham Corporation* v. *Foster*. (3) It is immaterial for this purpose whether the respondent is selling his own goods on his own land or selling other persons' goods by auction. The holding of a rival market on different days from those on which an ancient market is held may be an interference with the rights of the owners of the latter: *Elwes* v. *Payne*. (4)

This is really the question put by Cozens-Hardy M.R. in *Haynes* v. *Ford* (5): "Is this a case taken altogether out of the

(1) [1915] 1 Ch. 360.
(2) (1872) L. R. 7 Q. B. 690.
(3) (1894) 70 L. T. 371.
(4) (1879) 12 Ch. D. 468.
(5) [1911] 2 Ch. 237, 248.

C. A. 1915

HAILSHAM CATTLE MARKET COMPANY v. TOLMAN.

section on the ground that it is the establishment of a rival market?" The exception in s. 42 only deals with market days. It cannot have been intended that a man should be able to do on market days what he could not do on other days: *Abergavenny Improvement Commissioners* v. *Straker*. (1)

Romer, K.C., and *Beebee*, for the respondent. We do not contend that we have a right to disturb this market if we are not permitted to do so by the private Act. Sect. 40 gives the appellants power to maintain the market "subject to the provisions of this Act." That includes s. 42, which authorizes us to do what we have done. That section is both permissive and prohibitory. If under it a man can sell without being liable to the prescribed penalty he may do so without being liable to an injunction. That depends upon whether he is protected as we are by the exception. *Haynes* v. *Ford* (2) and *Abergavenny Improvement Commissioners* v. *Straker* (1) are in our favour. *Fearon* v. *Mitchell* (3) only decided a small question of fact. Sect. 42 only prohibits sales by us on market days in places not in our own occupation. Whether the sale is made by auction or not is immaterial: *Wiltshire* v. *Willett* (4); *Llandaff and Canton District Market Co.* v. *Lyndon*. (5) The only question here is whether s. 42 impliedly authorizes all sales other than those in respect of which penalties are imposed.

Martelli, K.C., in reply referred to *Great Eastern Ry. Co.* v. *Goldsmid*. (6)

PICKFORD L.J. This is an appeal from Sargant J., who held that the defendant was not committing any wrong to the plaintiffs or any breach of the plaintiffs' rights by what he had done in the way of selling cattle and other animals within the precincts of the market which was conferred upon the plaintiffs, the Hailsham Cattle Market Company. [His Lordship stated the facts and the effect of the private Act of 1871 and continued:] In my opinion s. 42 of the private Act is in substitution for s. 13

(1) (1889) 42 Ch. D. 83.
(2) [1911] 2 Ch. 237.
(3) L. R. 7 Q. B. 690.
(4) (1861) 11 C. B. (N.S.) 240.
(5) (1860) 8 C. B. (N.S.) 515.
(6) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.

of the Markets and Fairs Clauses Act of 1847, which is to this effect: [His Lordship read it.] Now the Markets and Fairs Clauses Act is only incorporated with this Act except where expressly varied, and I think that the result of the legislation is that the general Act is expressly varied by the insertion of s. 42 dealing with the same subject-matter; and, therefore, s. 42 is the section to which we have to look, and s. 13 of the general Act is only of importance, if at all, as tending to explain the meaning of sections of that description. If this were a market by franchise, it is not disputed that what was done by the defendant would be disturbance of the market by setting up a rival market, and Sargant J. has so held; but he has held that by reason of s. 42 what was done by the defendant is permitted. It is argued for the plaintiffs that it is not permitted, and that this ridiculous result will follow, that the plaintiffs being entitled to a market with market rights have a right to interfere and to restrain anybody who disturbs that market upon any days other than market days, but that such persons are protected upon market days by this section. Sargant J. has held that that is not so, and that they are not committing any wrong by holding a market upon any day whether market day or not. It was also argued by the plaintiffs that this does not extend either on market days or any other days to protect an act which is a disturbance of the market, and that all that is intended by s. 42 is to do this: the plaintiffs having the ordinary rights of a person who has market rights conferred upon him can restrain what is a disturbance of the market upon any day; but that they have by s. 42 an additional protection given to them, that on market days they can restrain by means of penalties; there is a penalty imposed upon persons who sell except under certain conditions whether it is a disturbance of the market or not.

Now if you start from the proposition that but for s. 42 the plaintiffs are entirely clothed with all the rights which would be theirs if this were a franchise market, there is very great force in that argument, but it seems to me you cannot quite look at the case in that way. You have to look back and see what rights are given to the plaintiffs. They have not got a franchise market, they have statutory market rights and those only, and in order to

C. A. 1915

HAILSHAM CATTLE MARKET COMPANY v. TOLMAN.

Pickford L.J.

see what market rights they have, you must look to the statute which gives it to them, and although it seems to lead to an extraordinary result which will probably make the grant to the plaintiffs of no value whatever, it appears to me that the proper construction is that they were given a right to establish a market, but with regard to sales with this protection and this protection only, that on market days if any person exposed for sale or letting except on any land or building belonging to him any horses, cattle, and so on, then he was subject to a penalty; and that that being the provision as to sales and the protection of the plaintiffs as to sales, it has to be read as the only protection of the plaintiffs as to sales, and that therefore they are not entitled to the general right of restraining anybody else from selling within the market limits. I do not think that it is a case where they have a right to restrain other people from selling within the market limits and there is an exception which cuts it down. I see very great difficulty indeed in reading the exception in s. 42 as anything wider than an exception out of the prohibition which precedes it, namely, a prohibition from doing something upon market days, but I think, as I have said, that the real result of the whole of the Act, s. 42 and the other provisions, is this, that for some reason or another the only protection that has been given to the plaintiffs in respect of sales is that given by s. 42; and that therefore, unless the act that has been done comes with the prohibition of s. 42, there is no infringement of the plaintiffs' right. It is said that what the defendant has done is setting up a rival market and was never intended to be included within the words "sell, let, or expose for sale." I really cannot pretend to say what was intended; I can only say what seems to be said. It was selling. What was done with regard to acquiring the land and sending out the circulars and so on was done preparatory and preliminary to the act of selling; it was, I think, selling, and was not selling upon land or buildings which were not belonging to or in the occupation of the defendant, and the authorities that have been cited to us show that where under a similar section to this a person is doing what he is authorized to do without incurring a penalty he is also doing what he is authorized to do without being restrained by injunction, although his act might amount to something which

otherwise would be restrained by injunction. For that reason I think the judgment of Sargant J. is right. As I say, the result looks to me very much as if it might reduce the rights of the plaintiffs to a very small compass indeed, because it gives anybody the right to sell in any way that they like by auction or otherwise and to collect persons for the purpose of selling so long as the land is in their own occupation. I have great doubts whether it was ever intended to extend so far, or rather, if it had been pointed out to anybody that it did extend so far, whether the enactment would ever have been made, but that seems to me to be the meaning of these words, and therefore I see no alternative to saying that Sargant J. was right in his judgment.

WARRINGTON L.J. I am of the same opinion.

The plaintiffs are a corporation incorporated by the Hailsham Cattle Market Act, 1871, for the purpose of establishing and maintaining a market in the parish of Hailsham, and the present action is brought against the defendant for an injunction restraining him from acts said to be a nuisance to that market. Now the wrong complained of against the defendant and which is alleged to be a nuisance to the market is, and is only, the sale by auction by him of marketable goods, namely, cattle, sheep, pigs, and so on, in buildings and on land which are his own property and in his own occupation within the market district. It seems to me that when we get those facts the real question we have to consider is how far has the grant, it being a statutory market, interfered with that which would be otherwise the legal right of every one of His Majesty's subjects, to sell his goods where and when he pleases. That that is the true way of looking at a statutory market—a modern market of this kind—is, I think, expressed by Blackburn J. in his judgment in *Fearon* v. *Mitchell.*(1) After having said what would be the effect in restraining the freedom of other people of the ordinary prescriptive market, he proceeds to say this: "Yet a modern grant of the franchise of a market would not of itself have so extensive an operation. But there cannot be much doubt that, under ever so modern a grant of a market by virtue of the Queen's prerogative, if a rival

(1) L. R. 7 Q. B. 690, 696.

C. A. 1915 — HAILSHAM CATTLE MARKET COMPANY v. TOLMAN. — Warrington L.J.

market were set up, that would be a disturbance of the franchise. The Legislature may well be taken to have had that distinction in view, and may well be taken to have said, 'in giving power to establish markets we will not prevent the sale of marketable goods in a man's own dwelling-house or shop, but in other respects we will prevent the market being disturbed.'" How far then have the Legislature in this case prevented the sale of marketable goods? That depends upon the true construction of the statute under which the market is established, the Hailsham Cattle Market Act of 1871. [His Lordship read ss. 2 and 42 of that Act and s. 13 of the Act of 1847.] I think it must be taken that s. 13 of the Act of 1847 is so varied by the private Act that it is not incorporated in it but is excepted from the general incorporation provision contained in s. 2; and I think so for this reason. I think it would be absurd to suppose that the Legislature deliberately intended to prohibit on days other than market days the sale of marketable goods, with an extremely narrow exception confined to sales in the man's own dwelling-house or shop, but that on market days it only prohibited sales with a much wider exception, namely, in any building or on any land owned by him or in his own occupation. It seems to me that, for the purposes of this case and for the construction of the Act of 1871, the prohibition and the only prohibition against sales is to be found in s. 42.

Now, starting with that, what is the effect of that section? I think the effect of it is not merely to exempt the sales under the conditions expressed in the general operation of the section, but that the saving which is contained in the section amounts to an express permission. In saying that I can only repeat what was said by the Master of the Rolls in *Haynes* v. *Ford*. (1) He says this: "Then comes the express saving, which is not merely an express saving, but ought to be construed as an express permission, that this section does not apply to any person or persons selling in his, her or their shop or shops. In other words, the whole question for us is this: Is what Mr. Ford is doing, selling in his own shop, within the permission given by s. 10 or is it a sale in a warehouse which is prohibited by the former part

(1) [1911] 2 Ch. 237, 247.

of the section; or (if you like to put it so high), is this a case taken altogether out of the section on the ground that it is the establishment of a rival market?"

All I find, therefore, construing the Act in the way in which I have said, is an express prohibition of any sales on market days, but with at the same time an express permission that such sales may take place if upon the man's own land or on land in his own occupation. If that is so, if that is the only prohibition contained in the statute, and I think it is, then the present defendant has not done that which he is prohibited from doing; he is only prohibited by the Act from selling on market days, and then only if he sells otherwise than on his own land or on land in his own occupation. What he has actually done is to sell not on market days, but to sell on land of his own and in his own occupation. In my opinion for these reasons the judgment of Sargant J. is right and the appeal ought to be dismissed.

LORD COZENS-HARDY M.R. I agree.

Appeal dismissed.

Solicitors: *Tippetts, for Coles, Sons & Tilburn, Hailsham and Eastbourne; Hart, Reade & Co.*

H. C. R.

C. A.
1915
May 6.

In re UNITED LONDON AND SCOTTISH INSURANCE COMPANY.

NEWPORT NAVIGATION COMPANY'S CLAIM.

[00205 of 1912.]

Insurance—Marine Insurance—Fire Insurance—Policy limited to Fire only, including General Average and Salvage Charges resulting therefrom—Insurance Company—Winding-up Order—Subsequent Fire—Total Loss—Rights of Assured—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 1—4, 23, 30, 53, 65, 66—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 17, 28; *Scheds. VI., VIII.*

A policy insuring a ship while on the Great Lakes "against the risk of fire only, including general average and salvage charges resulting therefrom," was drawn in such a form that it was doubtful whether it was a marine policy limited to fire, or a fire policy with marine incidents contractually attached. The ship was totally destroyed by fire a few days after the winding up of the insurance company:—

Held, on the construction of the policy, that it was a fire policy within the Assurance Companies Act, 1909, and that the assured could only prove for the unexpired portion of the premium.

Decision of Astbury J. [1915] 1 Ch. 578 affirmed.

APPEAL from a decision of Astbury J. (1)

By a policy of insurance, No. 48,290, dated April 11, 1912, the above company (which was registered under the Companies Acts) in consideration of 71*l.* premium insured the appellants, the Newport Navigation Company, U.S.A., for the term of twelve months from March 15, 1912, at noon, to March 15, 1913, at noon (local time) against all direct loss or damage by fire, except as thereinafter provided, to an amount not exceeding 2053*l.* ($10,000) to the following described property while located and contained as described therein, and not elsewhere, to wit: "2053*l.* or $10,000 on the hull, machinery, boilers, and everything connected therewith of the steamer *S. C. McLouth*, valued at $30,000 as per form attached hereto which is to be taken and read as forming part of this policy. This policy covers against the risk of fire only, including general average and salvage charges resulting therefrom."

The terms of the policy, as also of a printed slip which was

(1) [1915] 1 Ch. 578.

attached to it, are set out in the report of the case before Astbury J. The printed slip was headed "Form 100 A. Fire policy on vessels," and included the following paragraph: "This policy to cover said vessel only while on Great Lakes and waters tributary thereto."

On June 18, 1912, the insurance company was ordered to be wound up on a petition presented on June 5, 1912. On June 27, 1912, the ship was totally destroyed by fire. On October 30, 1912, the appellants lodged a proof for 2053*l.* On June 11, 1914, the liquidator rejected the proof on the ground that the loss occurred after the date of the winding-up order. On July 31, 1914, the appellants issued a summons for an order that the liquidator's decision be reversed and the claim allowed. On the hearing of the summons Astbury J. on February 23, 1915, held that the policy was a fire policy within the Assurance Companies Act, 1909, and that the appellants were consequently only entitled to prove for the portion of the premium unexpired at the date of the winding up.

From that decision the appellants appealed.

MacKinnon, K.C., and *L. F. C. Darby*, for the appellants. Under the Companies (Consolidation) Act, 1908, s. 206, the appellants are entitled to prove for the full amount insured by the policy: *Macfarlane's Claim* (1); *In re Law Car and General Insurance Corporation.* (2) The question is whether that right has been altered by the Assurance Companies Act, 1909. It is said that the effect of that Act is to limit the right of proof to the unexpired portion of the premium. That depends upon whether the policy is a policy of fire insurance or not. It is submitted that it is a policy of marine insurance to which the Act of 1909 does not apply. The Act does not apply to a marine policy where fire is the only peril insured against. Sect. 1 provides that the Act shall apply to all assurance companies carrying on assurance business of various classes, including fire insurance. Sect. 17 and Sched. VI. provide that in the winding up of an assurance company the value of a current policy shall be such portion of the last premium paid as is proportionate to the

(1) (1880) 17 Ch. D. 337. (2) [1913] 2 Ch. 103, 129.

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, *In re.* NEWPORT NAVIGATION COMPANY'S CLAIM.

unexpired portion of the period in respect of which the premium was paid. If this be a policy of fire insurance it is admitted that the judgment appealed against is right.

We submit that a policy on a ship, though not covering all the usual perils but only fire, is nevertheless a marine policy and not a fire policy within the Act, and when the policy in addition insures against general average and salvage claims it is still more clearly a marine policy.

A Lloyd's underwriter who writes a policy against fire on a ship is not carrying on fire but marine insurance. Otherwise he would have to comply with the requirements of Sched. VIII. (B) and (C) of the Act of 1909.

By s. 28, sub-s. 3, a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy. This policy covers not only damage or loss by fire, but also general average and salvage charges, which are only intelligible in maritime law. That this is a marine policy is shown by *Woodside* v. *Globe Marine Insurance Co.* (1) and *Imperial Marine Insurance Co.* v. *Fire Insurance Corporation.* (2) The whole business of marine insurance is quite distinct, and of course there are many reasons for the distinction, there being many peculiar rules relating to marine insurance exclusively: see Marine Insurance Act, 1906, ss. 1—4; s. 23, sub-s. 2; ss. 30, 53, 65, 66.

Again, by the ordinary law, if an agent purports to act without authority his principal can ratify the act, and that is so according to the law of marine insurance, but it does not apply to a contract of fire insurance: *Grover & Grover, Ld.* v. *Mathews.* (3) Further, the marine insurance doctrine of constructive total loss and notice of abandonment have no application to fire insurance. The distinction is also apparent from various other sections of the Act of 1909, e.g., s. 31 (*c*), Sched. I. (B).

Sect. 1 of the Marine Insurance Act, 1906, defines a contract of marine insurance as "a contract whereby the insurer undertakes to indemnify the assured . . . . against marine

(1) [1896] 1 Q. B. 105. (2) (1879) 4 C. P. D. 166.
(3) [1910] 2 K. B. 401.

losses, that is to say, the losses incident to marine adventure," of which loss by fire is one. This is obviously a policy upon a ship afloat, and is therefore a marine policy. An insurance on a ship cannot be non-marine, therefore no insurance on a ship is fire business within the Act of 1909. This is made clear by Sched. VIII.

Leslie Scott, K.C., and *H. E. Wright*, for the respondent, the liquidator, were stopped by the Court.

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, *In re.* NEWPORT NAVIGATION COMPANY'S CLAIM.

LORD COZENS-HARDY M.R. I do not see my way in this case to differ from the view which was taken by Astbury J. The case arises upon the construction of the Assurance Companies Act, 1909. That is a very difficult Act to construe. I had occasion to consider it in the case of *In re Law Car and General Insurance Corporation* (1), but I am bound to say the present case does not seem to me to present any serious difficulty. Fire insurance business is defined in s. 1, sub-s. (*b*), of the Act as follows: "The issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire." We have a policy here which undoubtedly falls within that definition. It is an insurance against loss by fire of a vessel while on the Great Lakes in America or in dry dock where it might be temporarily put for repairs; the loss insured against is loss by or incidental to fire, but the policy also includes general average and salvage claims resulting therefrom. Unless there were something else in the Act it seems to me that every ordinary Lloyd's policy would, or certainly might, come within the meaning of fire insurance business, because every Lloyd's policy really includes amongst other risks insured against that of fire. But it is taken out of the Act, as is made quite clear by s. 28, sub-s. 3: "Nothing in this Act shall apply to assurance business of any class other than one of the classes specified in s. 1 of this Act, and a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy." That being so it seems to me that the present case is not within the saving clause of sub-s. 3. This is not really a policy of insurance of which fire is only one

(1) [1913] 2 Ch. 103.

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, *In re.* NEWPORT NAVIGATION COMPANY'S CLAIM.

Lord Cozens-Hardy M.R.

of the various risks, but is a policy which is solely against loss by or incidental to fire, and the operative and effective clause is therefore s. 1, sub-s. (*b*). If that be so the provisions for the valuation of the policy, which are novel and inconsistent with *Macfarlane's Claim* (1), must apply here. It is not necessary to go through that case. It has not and could not have been disputed before us that if it is a policy of fire insurance within the meaning of the Act the principle of *Macfarlane's Claim* (1) does not apply and the express provisions of the Sixth Schedule do apply. For these reasons, which are substantially those given by Astbury J., I think that this appeal fails and must be dismissed.

PICKFORD L.J. I agree. A great part of the argument in this case has been directed to whether in ordinary parlance this is a fire insurance policy or a marine policy. If it were necessary to decide that, which I do not think it is, I should be inclined to agree with the appellants that this was a marine policy, especially looking at the definition of non-marine business in Sched. VIII. of this Act; but it does not seem to me that that matters at all. We have to see what is the kind of business which is subject to the provisions of this Act, and then see whether this policy does or does not come within those provisions. It is an insurance upon a ship navigating on the Great Lakes in America, and it is to this effect, so far as it is necessary to read the very long provisions of it: "This policy covers against the risk of fire only including general average and salvage charges resulting therefrom." The question is whether that comes within the description of fire insurance business in the Act of 1909. The Act says (s. 1) that "This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following

(1) 17 Ch. D. 337.

classes." The only class which relates to and is of importance in this case is fire insurance business. Now if it stopped there I suppose we should have had to inquire what in ordinary parlance most insurance people call fire insurance business, but it does not stop there. It goes on to define what is meant by that for the purposes of the Act, "that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

Now it does not seem to me possible to look at this policy and say that it does not come within those words. It is the undertaking of liability under a policy which "covers the risk of fire only including general average and salvage charges resulting therefrom." Therefore it is exactly within the words "the undertaking of liability under policies of insurance against loss by"—that is the direct clause—"or incidental to fire"—that is the general average and salvage charges resulting therefrom. That being so it seems to me that what we have to look for in this Act is something which says in effect—if it said it in words there would be nothing to discuss—that this Act shall not apply to policies of marine insurance or to marine insurance business. I cannot find anything of the kind in the Act. The only thing that I find is s. 28, sub-s. 3, which says: "A policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy." But for that it seems to me that an ordinary policy of marine insurance would come within the words of s. 1, but it is not intended that it should or that any other policy of which fire was one of the risks, and only one of the things insured against, should come within the section. Therefore that provision has nothing to do with this policy at all because it is a policy against fire only, except so far as it is an insurance against certain claims which are incidental to the fire having taken place.

The only other matter I need refer to—and it is a matter upon which the greatest stress was laid—is with regard to the words in the Eighth Schedule. Of course it is always very difficult to know exactly what an Act of Parliament means when the schedules are of greater length than the Act, and do not specially refer either to one another or to the provisions of the Act. I need not read

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, *In re.* NEWPORT NAVIGATION COMPANY'S CLAIM.

Pickford L.J.

the whole of the provision in the Eighth Schedule. It is a provision relating to "Requirements to be complied with by underwriters being members of Lloyd's or of any other association of underwriters approved by the Board of Trade." It really is a provision introduced for the protection of Lloyd's, who, as we know, are a very powerful body. It provides: "An underwriter who carries on fire insurance or accident insurance business may, in lieu of complying with the above requirements, elect to comply with the undermentioned conditions." Then there follow certain things which he has to do: "(*a*) All premiums received by or on behalf of the underwriter in respect of fire and accident insurance or re-insurance business carried on by him, either alone or in conjunction with any other insurance business for which special requirements are not laid down in this schedule, shall without any apportionment be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade: (*b*) He shall also furnish security to the satisfaction of the Board of Trade (or, if the Board so direct, to the satisfaction of the committee of the association), which shall be available solely to meet claims under policies issued by him in connexion with fire and accident business and any other non-marine business carried on by him." Then there follows a definition of non-marine business. I think that definition would exclude this policy from non-marine business, and therefore would make it marine business within the meaning of this schedule. But I cannot see that that schedule has anything like the effect contended for, which is this, that it takes all marine business out of the purview of s. 1. It does not seem to me to have anything to do with that. It contains provisions for the benefit of Lloyd's underwriters dealing with non-marine business, and dispenses with their having to comply with requirements which they would otherwise have to comply with. I think it is of importance, as Mr. Leslie Scott pointed out, to see what is introduced by s. 28, sub-s. 2: "This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the Eighth Schedule to this Act, and applicable to business

of that class." So that the Eighth Schedule is introduced simply as supplementary to s. 28, sub-s. 2, and really is not of general application at all.

For these reasons it seems to me that there is nothing in this Act of Parliament or in the schedule which is equivalent to saying, as I mentioned before, "This Act shall not apply to any business which is marine." I think that this policy comes within the exact words of s. 1, sub-s. 3, and that therefore this Act of Parliament applies to it and Astbury J.'s judgment was right.

WARRINGTON L.J. I am of the same opinion. The concrete question which has to be determined is for what amount is the assured entitled to prove in the winding up of the respondent company in respect of a claim upon a policy effected prior to the winding up, the claim maturing subsequently to the winding up.

Now that question turns upon the right decision of another question, namely, whether the policy in question is a fire policy subject to the provisions of the Assurance Companies Act of 1909, and in particular to the provisions of s. 17, sub-s. 1, and those of the Sixth Schedule as to the mode of valuation of such a policy. The Act by the 1st section defines the class of persons and companies to which it is to be applicable, and amongst others it is to be applicable to those "who carry on within the United Kingdom assurance business of all or any of the following classes." Amongst other classes that which is called fire insurance business is included. Fire insurance business is further defined in these terms: "that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

The policy in the present case is a policy of insurance against loss by fire exclusively and against certain other claims or losses resulting from fire, and which I think come fairly within the expression "incidental to fire." The policy therefore so far undoubtedly comes within the class of policies issued by people who are said by the Act to be carrying on fire insurance business. The contention on the part of the appellants is that

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, *In re.* NEWPORT NAVIGATION COMPANY'S CLAIM.

Warrington L.J.

if a policy of insurance against loss by or incidental to fire is a policy of that nature on a vessel or cargo, which may be stated shortly to be the usual subject of marine business, then it is not to be treated as fire insurance for the purposes of this Act. In my opinion it is impossible to find anything in the Act to justify that contention. The only provision which I can refer to for that purpose is the provision in s. 28, sub-s. 3: "Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in s. 1 of this Act." I pause there for one moment. Marine insurance may be said to be insurance business of a class other than one of the classes specified in s. 1 of this Act, but it has occurred to the framer of the Act that if you were to leave it there the ordinary policy of marine insurance might be subject to the provisions of the Act because the risk of fire is one of the risks insured against. Therefore he has placed on the statute the second sentence of that sub-section: "And a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy."

In the present case loss by fire is the only risk, and short of saying that any policy insuring against fire, which is a policy on a vessel or cargo or other matter, usually the subject of marine insurance, is excluded from this Act, I do not see how it is possible to exclude this particular policy. The provisions of the Eighth Schedule do not, in my opinion, help the appellants, because they merely enact certain regulations which are to be complied with by the particular class of persons who are referred to in the 2nd sub-section of section 28, namely, "a member of Lloyd's or of any other association of underwriters approved by the Board of Trade."

On the whole, therefore, I think that the judgment of Astbury J. was right, and that this appeal ought to be dismissed.

Solicitors: *Parker, Garrett & Co.; Wrensted, Hind & Roberts.*

G. A. S.

C. A.
1915
May 7.

ADAMS *v.* THRIFT.

[1914 A. 240.]

Company—Prospectus—Misrepresentations—Directors—Liability—Reasonable Ground for believing Statements to be true—Uncorroborated Statements of Promoter—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 84, *sub-s.* 1 (*a*).

In an action by a shareholder against the directors of a company, to recover compensation for misrepresentations contained in the prospectus signed and issued by them, on the faith of which he had taken shares:—

Held, that the uncorroborated statements of the vendor to and promoter of the company afforded by themselves no "reasonable ground" for believing those statements to be true, and the directors were therefore not entitled to the protection of s. 84, sub-s. 1 (*a*), of the Companies (Consolidation) Act, 1908.

Decision of Eve J. [1915] 1 Ch. 557 affirmed.

Appeal from a decision of Eve J. (1)

The action was brought by the plaintiff, William Henry Adams, to recover compensation from the directors of the Stolz Electrophone Company (1913), Limited, in respect of false statements in the prospectus of the company. The defendant directors were Sir John Edward Thrift (retired Chief Inspector of Stamps and Taxes for the United Kingdom), Lord Rosmead, Robert Arthur Buddicom, J.P., and Dr. George Fernandez Clarke. The managing director and promoter of the company, Joseph Holt, had become bankrupt, and his trustee in bankruptcy was also a defendant to the action.

The facts of the case are fully stated in the report of the hearing of the action before Eve J. It is sufficient for the purposes of this report to state that it was held by Eve J. that the prospectus contained several untrue statements on very material points, and that the plaintiff had subscribed for shares in the company on the faith of the prospectus and in the belief that the statements contained therein were true. It was argued on behalf of the defendant directors that they had reasonable ground within s. 84, sub-s. 1 (*a*), of the Companies (Consolidation) Act, 1908, to believe, and did up to the time of the allotment of

(1) [1915] 1 Ch. 557.

C. A. 1915 ADAMS v. THRIFT.

the shares to the plaintiff believe, that the impugned statements were true. It was contended on behalf of the defendant Clarke in particular that he did not in fact know of the statements in the prospectus, and that he signed it after the other three directors had signed. He honestly believed the statements to be true, relying on what was told him by the promoter, Holt, and also upon the fact that the other directors had made inquiries the result of which was presumably satisfactory to them, as they had signed the prospectus.

Eve J. found that none of the defendant directors had reasonable ground to believe that the false statements in the prospectus were true, and he held them all liable to compensate the plaintiff.

The defendant Clarke appealed.

Schiller, K.C., and *D. White*, for the appellant. It cannot be disputed that the prospectus contained serious misstatements and that the promoter, Holt, was a rascal who had victimized the defendant directors. The appellant as a medical man satisfied himself that the instrument to be dealt in by the company was genuine and not a quack affair. He relied upon his co-directors Sir John Thrift and Lord Rosmead, who were business men, and had, as he was told, carefully inquired into the matter of the company. He asked Holt if the statements in the prospectus were true, and his reply was, "It is all right." It is submitted that the appellant had reasonable grounds for his belief that the statements were true: *Stevens* v. *Hoare*. (1)

Maugham, K.C., and *Ashton Cross*, for the plaintiff, were not called upon to argue.

LORD COZENS-HARDY M.R. I think this is a very plain case and that Eve J.'s judgment, if I may respectfully say so, is in accordance with common sense and good law. The action is brought against several directors of this company, of whom Dr. Clarke is the only appellant. His appeal is based upon s. 84 of the Companies (Consolidation) Act, 1908, which provides that "Where a prospectus invites persons to subscribe for shares in

(1) (1904) 20 Times L. R. 409.

or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus . . . . shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein . . . . unless it is proved—(*a*) with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true . . . ."

What the plaintiff has to prove and what he has proved here beyond the shadow of a doubt is that the prospectus contained a mass of untrue statements, and very material misstatements, and he has also proved beyond doubt that Dr. Clarke was one of the directors who signed and issued the prospectus. When the plaintiff has proved that, the defendant, if he seek to escape liability, must show that he comes within the proviso (*a*). He must prove that he had reasonable ground to believe and did, up to the time of the allotment to the plaintiff of his shares, believe that the statements were true. The facts of the case are very short. The prospectus, as I have said, contained a mass of misstatements. The learned judge refers to four of them in his judgment: (1.) The statement that the instrument in which the company was contemplating trading was protected by the enumerated patents. There was no truth in that at all. (2.) That the business of the American company had throughout its existence been of a highly remunerative character. (3.) The statement as to the turnover of the London company. (4.) The statement as to the branches and agencies.

The learned judge found that each of these was a deliberate statement of fact in reference to a particular subject-matter and a statement which is wholly untrue or wholly false and not capable of any equivocal construction. Dr. Clarke was a medical man. What was his idea of the position of a director? He knew nothing about his responsibility. He did not even read the prospectus which he signed, and did not see it for some time afterwards. He had not asked any person for any information

C. A. 1915 ADAMS v. THRIFT. Lord Cozens-Hardy M.R.

as to the particular points in the prospectus which are complained of as being untrue. What he said was that Holt, who was promoter and managing director, told him it was "all right." Holt did not let him see one document at which he suggested he might look. He told him it was all right. I agree with the learned judge that the promoter is the very last person whose uncorroborated statements ought to be relied upon by an intending director as justification for saying that he had reasonable ground for belief. I cannot find that Holt did in fact ever say to Clarke that the statements in the prospectus were true. There is no suggestion of anything of the kind. All the appellant said was that the other directors had signed the prospectus before he did, and that that was quite sufficient justification for him to believe that what they had signed must be true—reasonable ground for belief—although he did not know what the statements in the prospectus were. It seems to me that proposition is unreasonable and cannot be supported. It has been argued that a director cannot be expected of his own knowledge to verify the truth of all the statements in a prospectus. Nobody said that he could. Even if he alone or other members of the intended board had taken the opinion or obtained a report of competent people as to the material facts in the prospectus, that might have afforded a reasonable ground of belief. Of course it is not necessary that an intending director should play the part of a lawyer or accountant by examining into facts or figures, nor that he should act as a patent agent. But if he will sign a prospectus without obtaining or even asking for any information of this kind, it is quite clear that he cannot protect himself under the proviso to this section even though the directors who signed the prospectus before him might and did believe the statements contained in it to be true. In my opinion the appeal is hopeless and must be dismissed.

PICKFORD L.J. I agree. The prospectus contained distinct statements of fact every one of which was false, and every one of which could have been verified or falsified by the very simplest methods of inquiry. The appellant did not even know what the statements in the prospectus were. It need hardly be said,

therefore, that he did not take any steps to see whether they were true or not. But what he says he did was this. He believed that Holt, the promoter, who seems to have turned out a very dishonest person, was in fact an honest man. He therefore accepted the statements that he made to him which were of a most general kind, and, so far as I understand, just before he signed the prospectus Holt told him that it was "all right." In addition to this he was told that Sir J. Thrift had made persistent inquiries, so much so as to have become tiresome to Holt. As to what statements Sir J. Thrift had made inquiries the appellant did not know. All he knew was that Thrift had made some inquiries and was satisfied. As a matter of fact the appellant did not know what Thrift had approved. He knew that Thrift had made some inquiries and that he was satisfied with the answers, but what they were he had not the least idea. A report of certain accountants was shown to him — a very favourable report in some respects, but not a report to be depended upon because it pointed out that the books were irregularly kept and that the accountants were not certain about the figures with which they were supplied. The appellant never actually saw this though he was told some particulars of it. He was told by Holt when he asked to see it that he could not have it. He had just such portions of it as Holt chose to read, but if he had heard the whole of it there is not a word in confirmation of this document. It is a report that there was a good and substantial business being done, but the specific statements in the prospectus are not dealt with in that report at all. Beyond that the appellant made no inquiries. He relied on the fact that Thrift had signed the prospectus before him. I agree with the learned Master of the Rolls that the appellant's suggestion carries its own refutation. If it were accepted it would come to this, that anybody might safely sign a prospectus which other men, whom he believed to be honest, had previously signed. The appellant says that that constitutes a reasonable ground for his believing the statements to be true. That he did honestly believe them I have no doubt; that he had any reasonable ground, in the legal sense, for his belief I do not think. He never made a single inquiry. They were statements of fact which were quite easy to verify or falsify.

C. A. 1915 ADAMS v. THRIFT. Pickford L.J.

They were not deductions from facts such as often appear in prospectuses which do require a considerable amount of investigation, but they were clear and simple statements of fact the truth or falseness of which could be ascertained on the slightest investigation on behalf of himself or others. The appellant never had a single report of anybody who had seen the books verifying any of these statements. I cannot conceive, on these facts, how it is possible to find that the appellant had any reasonable ground for his belief. The appeal must be dismissed.

WARRINGTON L.J. I agree. There is a statement in the prospectus—a plain statement of fact—which is false, namely, the statement as to the patents. It does not appear upon the evidence that Dr. Clarke was told by anybody that that statement was true, not even by Holt, the promoter. All that he says about Holt is that he asked him "Is everything perfectly all right?" and Holt said "Of course it is—a man like Sir John Thrift says he is satisfied"—and so on. Holt never pledged himself to the assertion that that statement in the prospectus was true. The result is that beyond the fact that the prospectus had been signed by Sir J. Thrift and Lord Rosmead, (and upon this he signed,) he had no grounds at all, reasonable or otherwise, for believing that statement to be true.

Solicitors: *White & Co.; Munns & Longden.*

G. A. S.

In re IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND), LIMITED'S TRADE MARKS.

C. A.
1914
EVE J.
July 23, 24;
Dec. 1.
1915
C. A.
April 28, 29.

[1913 J. 1272.]

Trade Mark—Rectification of Register—Old Marks—Royal Warrant—Prince of Wales' Feathers—"Calculated to deceive"—Royal Warrant Holders—"Person aggrieved"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 35, 39, 41, 68—*Trade Marks Rules*, 1906, *r.* 12.

A tobacco company was the registered owner of three trade marks for manufactured tobacco consisting, in part, of the Prince of Wales' feathers. The marks had been continuously used by the company and their predecessors in title for a long series of years in connection with the sale of tobacco, and were all registered as old marks prior to 1905. No Royal warrant had been granted to the company for the right to use the feathers, nor, when a motion to expunge the marks was launched, were there any persons holding warrants from the present or any former Prince of Wales. Upon a motion by the Royal Warrant Holders' Association under s. 35 of the Trade Marks Act, 1905, to have these three marks expunged from the register on the ground that they were contrary to law and calculated to deceive within the meaning of s. 11 of the Trade Marks Act, 1905:—

Held, on the evidence, by the Court of Appeal, affirming the decision of Eve J., that the applicants had not established that the marks were calculated to induce the belief that the respondents held a Royal warrant, but even if they had been, s. 11 of the Act had no application to marks which were in no sense contrary to law when registered, and the use of which at the present time was identical with that which had obtained ever since they were registered. The mere fact that the marks contained matter now no longer registrable did not supply any reliable criterion for determining whether they were contrary to law, or for measuring their alleged deceptive qualities.

Held, further, by Eve J. (but not decided by the Court of Appeal), that the applicants were not "persons aggrieved" within s. 35 of the Act.

This was a motion dated July 25, 1913, by the Royal Warrant Holders' Association, under s. 35 of the Trade Marks Act, 1905, to expunge from the Register of Trade Marks three marks registered in the name of the respondents, the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in class 45 for manufactured tobacco.

The applicant association was a body incorporated by Royal charter on February 25, 1907, having for its objects, inter alia,

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

(2.) to prevent the assumption or use by any person, in connection with any trade, business, calling, or profession, of the Royal Arms, or any device, emblem, or title in any manner which for the time being might not be duly authorized by law; (4.) to prevent the representation by any person without lawful express authority that such person enjoyed Royal patronage; (5.) to take action for the enforcement of laws affecting the above matters.

Members of the association were holders of various Royal warrants. By a letter dated May 9, 1906, the applicant association had authority from the Lord Chamberlain to take proceedings under s. 68 of the Act of 1905. By a letter of March 24, 1908, the association was authorized to use the badge and feathers of the Prince of Wales. On March 30, 1914, there was a further authority by the Lord Chamberlain to take legal proceedings in all cases of the unauthorized use of the Prince of Wales' feathers.

The first of the three marks, No. 538 of 1876, consisted of three feathers surrounded by a coronet and the words "Ich Dien." It was registered by the firm of Franklyn, Morgan & Davey on January 11, 1876, and had been in use for more than ten years before the date of registration.

The second mark, No. 1807 of 1876, was a representation of the Prince of Wales' plume surrounded by a belt with the words above, "The Prince of Wales'," and beneath, "Smoking Mixture," and a representation of part of the tower or of a castle with the name "Fryer & Coultman" across and the words and figures "Tower Tobacco Manufactory, 2 and 3 West Smithfield," surrounding the tower or castle and enclosed by two lines. This mark was registered by the firm of Fryer & Coultman on February 4, 1876, and had been used for six years and upwards prior to registration.

The third mark, No. 158,839 of 1891, was registered on September 16, 1891, by the same firm of Fryer & Coultman, having been used from a date one year prior to August 13, 1875. This mark was practically the same as the second mark with the addition of a portrait of the late King when Prince of Wales.

These three marks were now vested in the respondents, and were old marks, that was to say, registered with a claim as having been used before August 13, 1875, and all having been on the register for seven years subsequent to the passing of the Trade Marks Act, 1905.

The objections to the continuance of the marks on the register were stated in the particulars of objections delivered in the course of the proceedings and were as follows: "(1.) The right to use the Prince of Wales' feathers is an honour conferable by the Prince of Wales and determinable at will and the device of the feathers cannot be monopolized as a trade mark. (2.) The said three marks, by reason of their consisting of or containing the Prince of Wales' feathers, are calculated to deceive by leading to the belief (contrary to the fact) that a Royal warrant or other proper authority for the use of the feathers has been granted by the Prince of Wales. (3.) Marks 1807 and 158,839 are further calculated to deceive by reason of the presence therein of the title 'The Prince of Wales'' and to lead to the belief that the smoking mixture referred to is supplied to and used by the Prince of Wales. (4.) Mark 158,839 is calculated to deceive by reason of the portrait of Edward VII. Such mark, by reason of the presence of the said portrait, is calculated to lead to the belief that the smoking mixture sold thereunder was supplied to and personally used by His late Majesty King Edward VII. as a smoking mixture and that a consent had been given by him for the use of the label bearing his portrait, in connection with the said goods. (5.) The said marks offend against the Royal Prerogative, the provisions of section 11 of the Trade Marks Act, 1905, and section 20 of the Merchandise Marks Act, 1887."

A large number of affidavits were filed upon the question whether the use of the Prince of Wales' feathers was calculated to deceive people into the belief that their display was authorized by Royal warrant. The effect of these and other affidavits, and the conclusions to be drawn from them, sufficiently appear from the judgment of Eve J.

The motion came on for hearing before Eve J. on July 23, 1914.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Cave, K.C., Maugham, K.C., and *Kerly, K.C.*, for the Royal Warrant Holders' Association. In the case of each of the three marks the feathers, and in the case of two of them the words "Prince of Wales," have been used without any authority. Their use has been "calculated to deceive" as representing that there is authority to use them, and that the smoking mixture is used in the Prince of Wales' household. The result might be that, if hereafter the Prince granted a licence to any one to use the feathers, that licence might be practically useless. In 1912 an application was made by the British American Tobacco Company for registration of a trade mark containing the Prince of Wales' feathers, and practically identical with one of the present trade marks, and that was opposed by the Warrant Holders' Association, who succeeded in their opposition. That makes them aggrieved persons.

The feathers are part of the Prince of Wales' heraldic achievements, dating from the time of the Black Prince, or at any rate from the end of the fourteenth century, granted to each Prince of Wales, whose title is conferred upon him by Order in Council. It has been the practice of 100 years for the Prince of Wales to grant to tradesmen the right to use the badge. So the use of it implies a right to use it. The present Prince of Wales has never yet granted any such right.

The sections of the Trade Marks Act, 1905, bearing upon the questions at issue are ss. 11, 35, 39, and 41, and the Trade Marks Rules, 1906, r. 12.(1) We are not here under s. 68 of the

(1) Sect. 11 of the Trade Marks Act, 1905, provides as follows:—

"It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design."

Sect. 35. "Subject to the provisions of this Act—

"(1.) The Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, make such order for making, expunging, or varying such entry, as it may think fit: . . . ."

Sect. 39. "Subject to the provisions of section forty-one of this Act

Act, which relates to the Royal Arms and applies to an application for an injunction. Except for the registration we should come under it.

As regards the Royal Prerogative, no one has any right to use anybody's crest or arms without the grant of the Earl Marshal, now of the Heralds' College. But there is no Court in existence which takes cognizance of the use by one man of another's crest or arms: Halsbury's Laws of England, vol. xxi. p. 353, note (*u*). So, although it is illegal to use another man's crest or arms,

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and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark shall, if valid, give to such person the exclusive right to the use of such trade mark upon or in connexion with the goods in respect of which it is registered: . . . ."

Sect. 41. "In all legal proceedings relating to a registered trade mark (including applications under section thirty-five of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen), be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of section eleven of this Act: Provided that nothing in this Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connexion with goods, upon or in connexion with which such person has, by himself or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first-mentioned trade mark by the proprietor thereof or his predecessor in business, or to object (on such user being proved) to such person being put upon the register for such similar trade mark in respect of such goods under the provisions of section twenty-one of this Act."

Sect. 68. "If any person without the authority of His Majesty, uses in connexion with any trade, business, calling, or profession, the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or if any person without the authority of His Majesty or of a member of the Royal Family, uses in connexion with any trade, business, calling, or profession any device, emblem, or title in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family, he may, at the suit of any person who is authorised to use such arms or such device, emblem, or title, or is authorised by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction or interdict from continuing so to use the same: Provided that nothing in this section shall be construed as affecting the right, if any, of; the proprietor of a trade mark containing any such arms, device, emblem, or

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

there is no penalty attached to it: *Austen* v. *Collins* (1); *In re Croxon.* (2)

The trade marks are contrary to the law as contained in s. 20 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), inasmuch as they represent that the goods in respect of which they are used are made, by a person holding a licence, for the service of members of the Royal household. There can be no purpose for the assumption of the trade marks except to represent that the proprietor has some connection with the Prince of Wales. The inference is that the badge is used by authority. Under r. 12 of the Trade Marks Rules, 1906, the word "Royal" can only be used in the case of an old mark. Mere user is calculated to lead to the belief that the user is authorized: *Royal Warrant Holders' Association* v. *Slade & Co.* (3) The mere use of a shamrock as a trade mark has been held to be a representation that the goods were made in Ireland: *In re McGlennon's Application.* (4) The use of the word "Royal" has been held calculated to deceive as suggesting the existence of a Royal patronage: *In re Royal Worcester Corset Co.'s Application.* (5) "Orlwoola" has been held to be deceptive if the goods are not all wool: *In re H. N. Brock & Co.* (6) The mere display of the Royal Arms has been held calculated to lead to the belief of authorization: *Royal Warrant Holders' Association* v. *Edward Deane & Beal.* (7) The question to be considered is what the

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title to continue to use such trade mark."

Rule 12 of the Trade Marks Rules, 1906, provides as follows:—

"Representations of the Royal Arms or Royal crests, or arms or crests so nearly resembling them so as to lead to mistake, or of British Royal crowns, or of the British national flags, or the word Royal or any other words, letters or devices, calculated to lead persons to think that the applicant has Royal patronage or authorisation, may not appear on trade marks, the registration of which is applied for. Provided always that nothing contained in this rule shall preclude the registrar from allowing the registration as an 'old mark,' that is a mark which was used by the applicant or his predecessors in business before the 13th August, 1875, of any mark which was capable of being so registered before the Trade Marks Act, 1905, came into operation."

(1) (1886) 54 L. T. 903.

(2) [1904] 1 Ch. 252.

(3) (1908) 25 Rep. Pat. Cas. 245.

(4) (1908) 25 Rep. Pat. Cas. 797.

(5) [1909] 1 Ch. 459; 26 Rep. Pat. Cas. 185.

(6) [1910] 1 Ch. 130.

(7) [1912] 1 Ch. 10.

use of these emblems suggests to the mind of any ordinary member of the public. Lapse of time cannot be any defence to doing what is calculated to give a wrong impression. As to the third mark, any one looking at it would think the tower and surroundings were the trade mark, which is misleading: *In re Apollinaris Co.'s Trade Marks* (1), followed in *In re Dexter's Application.* (2)

The applicants will, if necessary, apply to amend and to add as a party Mr. Duncan, tobacconist, who has the warrant to use the Royal Arms, and also to make the Prince of Wales' counsel a party. But, on the facts as they stand, we submit that there is ample evidence that people are liable to be deceived by these marks. No doubt the user is upwards of forty years old, but length of time is of no importance; the question is what is the effect of this user? There is no authority suggested for the use of these badges, and the marks should be removed. The object of the applicants is to purify the register: *Paine & Co.* v. *Daniells & Sons' Breweries.* (3)

Sir S. O. Buckmaster, S.-G., and *Austen-Cartmell*, for the Comptroller. The position taken up by the registrar is that until some good cause is shown the register is assumed to be properly kept. If these marks were new marks he would not register them, as they would not be distinctive. On the question whether the marks should now be removed the registrar's view is that these emblems are the badge of the Prince of Wales, and the right to display them is vested in the Prince of Wales and his grantees. This right might be given or withdrawn, and the use of these marks in connection with the particular goods which were the subject of the application would lead people to believe that consent had been given. If that was so, then the marks were calculated to deceive under s. 11 of the Act. But if that were not so, the registrar did not think they would be otherwise disentitled to protection.

Walter, K.C., Colefax, K.C., and *L. B. Sebastian*, for the respondents. The present application is one of extremely wide and far-reaching importance, because it affects a large number

(1) [1891] 2 Ch. 186, 233. (2) [1893] 2 Ch. 262.
(3) [1893] 2 Ch. 567.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

of marks under s. 68 of the Act if these marks are taken off the register. We submit, first, that the applicants are not persons aggrieved under s. 35 of the Act, and the motion must be dismissed upon that ground; secondly, that the marks complained of are not calculated to deceive, in view of the facts proved; further, that there is no exclusive right to the user of the Prince of Wales' feathers, and such a right has not been established to the satisfaction of the Court.

As to (1.) a common informer may not take proceedings under s. 35 of the Act. There must be a legal grievance or injury in a legal sense: *In re Rivière's Trade Mark* (1); *In re Apollinaris Co.'s Trade Marks* (2); *In re Wright, Crossley & Co.'s Trade Mark* (3); *In re Ellis & Co.'s Trade Marks.* (4) There is a proper person to assert the right, but he is not before the Court.

There must be some person aggrieved in his trade, and the applicants carry on no business or trade. They have never used the badge for any trading purposes. If they only expect to get a right to use it there cannot be any person aggrieved quia timet. No single person has any grant at the present time. These are all old marks properly registered before 1875. In s. 11 of the Act of 1905 the word "matter" is introduced for the first time; that appears to be some alteration in the law as contained in the corresponding sections in the Acts of 1875 (s. 6) and 1883 (s. 73), where the prohibition related to "words." We contend that there is no power to remove these marks now; they were registrable marks under the old Act.

Then, on the other points, there is no evidence that any person was really deceived or injured in his trade. It cannot be said that the user is calculated to deceive. Sect. 35, sub-s. 2, of the Act of 1905 enables the Court to decide any question in connection with the register. The principle upon which the Court acts is not to destroy a trade which has been built up round an old mark; the practice of the Court has been to protect old marks. The Court could not restrain a user under Royal warrant; it is not a registered trade mark. The application is therefore mis-

(1) (1884) 26 Ch. D. 48.
(2) [1891] 2 Ch. 186.
(3) (1898) 15 Rep. Pat. Cas. 131.
(4) (1904) 21 Rep. Pat. Cas. 617.

conceived and should be refused. [They also referred to *Royal Warrant Holders' Association* v. *Edward Deane & Beal.* (1)]

Cave, K.C., in reply, on the construction of the Act, referred to *In re Hill's Trade Mark* (2), *R. Thorne & Sons, Ld.* v. *Pimms, Ld.* (3), and *In re W. & G. Du Cros' Applications* (4); and, on the question whether the applicants were persons aggrieved, cited *In re Powell's Trade Mark* (5) and *In re Zonophone Registered Trade Mark.* (6)

The applicants are holders of Royal warrants and some are tobacconists, and the present unscrupulous use of this particular badge without any authority from the Lord Chamberlain or the Prince of Wales gives the applicants a real interest in making their claim. The gentleman we desire to add is a member of the applicant association and a trader himself, and is aggrieved by the presence of these marks on the register.

Cur. adv. vult.

1914. Dec. 1. EVE J. This motion is launched under s. 35 of the Trade Marks Act, 1905, and the relief sought is the removal from the register of three marks belonging to the respondents, the Imperial Tobacco Company (of Great Britain and Ireland), and used by them in the carrying on of their trade or business. The motion is founded on the allegation that each mark is contrary to law or contains matter so calculated to deceive within the meaning of s. 11 of the Act as to disentitle it to protection in a Court of justice. The burden of establishing this proposition lies of course on those who assert it. [His Lordship then stated the description of the three trade marks and continued:] It is established by the evidence that from the years 1866, 1869, and 1874 respectively these marks have been continuously and extensively used for the sale of tobacco and snuff by their successive owners down to the present time, and, subject to a single and singular exception, no evidence has been adduced to show that any purchaser has ever been deceived by what the applicants now

(1) [1912] 1 Ch. 10.
(2) (1893) 10 Rep. Pat. Cas. 113.
(3) (1909) 26 Rep. Pat. Cas. 221.
(4) [1912] 1 Ch. 644.
(5) [1893] 2 Ch. 388.
(6) (1903) 20 Rep. Pat. Cas. 450.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Eve J.

contend are the deceptive attributes of the marks. [His Lordship then stated the five objections to the marks.]

Dealing with these objections seriatim I will assume that the statement of fact with which paragraph 1 commences is correct and that the concluding sentence of the same paragraph accurately states the existing law and practice, but what assistance does such assumption afford me in dealing with the present application? Each of these three marks was a good registrable trade mark under the statutes and practice in force prior to the Act of 1905, and I decline altogether to adopt the view that the mere fact that they contain matter now no longer registrable supplies any reliable criterion for determining whether they are contrary to law or for measuring their alleged deceptive qualities. In my opinion there is no substance whatever in the first objection. In support of objections 2, 3, and 4 a number of affidavits have been filed, partly in chief, partly in reply. I will refer to some of them more particularly by and by, but, in substance, what the deponents say is that any and every display of the Prince of Wales' feathers by a trader in connection with his goods leads to the belief in their minds that such display is authorized by Royal warrant.

I do not doubt the bona fides of the deponents, many of whom are Royal warrant holders or members of firms holding Royal warrants, and quite conscious of the advantages attached to the holding of such warrants, but in my opinion the premises do not in any way justify the conclusion at which they arrive. The evidence shows that not only has the device of the three feathers been used by the predecessors of the respondents for a long series of years, going back it is claimed in some cases to the year 1827 and earlier, but also that it has been adopted by traders holding no Royal warrant for all kinds of goods and has been registered as, or as part of, a trade mark for a great variety of different goods. In a very large number of these cases it has been displayed with the addition of the words "trade mark" or "registered trade mark," a user wholly inconsistent with a claim founded solely on a revocable licence.

In the face of these facts it is a little surprising to find the experienced secretary of the applicant association stating in

paragraph 11 of his affidavit filed on October 30, 1913, that when he first saw the respondents' marks, including No. 538, he "inferred and believed that the owners of the marks had at the time of registration an authority from the Prince of Wales entitling them to the use of the said feathers." He does not tell us when or the circumstances in which he first saw the respondents' marks, and I find it difficult to reconcile his "inference and belief" as to the circumstances at the respective dates of registration with the knowledge which he, of course, possesses, that the authority to use the feathers of which he speaks would be a revocable one and would certainly not justify an application to register the device as a trade mark. Nor is there anything to show that before "inferring and believing" he paused to consider how far his conclusions might be affected by the extensive user of the device by other traders to which I have just alluded.

Again, in view of the established facts as to the user of the device, of what possible assistance to the Court can be the evidence of a deponent who swears "The Prince of Wales' feathers have been, so far as I know, displayed only by warrant holders to the Prince of Wales"? I am not suggesting that what the deponent, Mr. George Ashton, says is not true—the more truthful the statement, the less is he qualified to help me.

And this brings me to a batch of thirteen or fourteen further affidavits filed in chief in support of the motion. They are in the main almost identical in terms. The deponent commences by saying that he has seen the advertisements in the *Trade Marks Journal* of the three marks and has been shown packets and tins of tobacco bearing the marks complained of. It would seem that, with one exception, the deponents had no knowledge of any of the marks or labels prior to being invited to express an opinion thereon in the form of an affidavit, but three-fourths of their number commit themselves forthwith to the following statement or to one of a like effect: "The conclusion which I without any hesitation drew from the prominent display of the Prince of Wales' feathers on such tin and packet of tobacco was that such display had been authorised by the Prince of Wales." The remaining one-fourth are somewhat more cautious

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

EVE J.

and confine their attention to the mark numbered 158,839, the use of which, they say, leads them to believe that the smoking mixture to which it is affixed "had been regularly supplied to His late Majesty King Edward VII., when Prince of Wales, for his own personal use."

The one deponent who, unlike the others, seems to have had some acquaintance with the marks before being invited to make his affidavit is the one purchaser to whom I referred in the earlier part of my judgment as having possibly been misled. He enjoys the unique distinction of being the oldest past president of the applicant association, and it is clear from his affidavit that he has for years past been living in an atmosphere of Royal warrants. He has from time to time purchased tobacco labelled with the mark No. 1807 and he says: "From the display of the feathers and the use of the words 'The Prince of Wales'' I have concluded when I have bought the said tobacco that it was being regularly supplied to His late Majesty King Edward during the time he was Prince of Wales"; and he also adds: "Whenever I have seen the feathers displayed by a trading firm I have always assumed that proper authority has existed for such display." No one would doubt the deponent's good faith, but, in my opinion, there was nothing to warrant the conclusion which he drew or the assumption he made, and a very little outlook on the world which revolves outside the orbit of the Royal Warrant Holders' Association would, in my opinion, have enlightened him on these points. To my mind, however disappointed he may be at finding that the smoking mixture he purchased was not supplied for the personal use of His late Majesty, he has no more right to complain than if he ascertains, as may indeed well be the fact, that the knife powder used in his domestic establishment was neither invented nor manufactured nor sold nor even used by the great Duke whose name it bears, or that the bag which he carries on his week-end outings is not identical with the receptacle habitually used by the great statesman after whom it is called, for the transportation of his shirts and collars.

The further affidavits filed in reply, totalling some eighteen in number, are to the same effect as those with which I have

been dealing. The opinions of the deponents are occasionally expressed with a little less precipitancy than are those of the deponents to the affidavits in chief, but the one remarkable feature which applies to them all is that no single deponent, even when deposing to an affidavit to be used in reply, seems to have been given the opportunity of becoming acquainted with the facts proved in the respondents' affidavits and of thereby qualifying himself to appreciate how far his conclusions on matters of opinion could be reconciled with established facts.

Litigants who set out to prove a case of this kind, relying on affidavits of this character containing positive and reiterated expressions of opinion, arrived at "without any hesitation" on the mere production of exhibits and the putting of one or two leading questions, and apparently without any inquiry on the part of the deponent or information on the part of the questioner as to how far the value of these precipitate and confidently expressed opinions might be dependent upon or modified by even a superficial investigation into relevant facts, must not be surprised if, when the investigation has been made and the truth has been ascertained, the value of such evidence steadily decreases as the real facts emerge and ultimately vanishes altogether.

That is really what has happened here: these two or three dozen perfectly honest and respectable deponents have unwittingly jumped to conclusions and expressed those conclusions in positive opinions without having first equipped themselves with an adequate knowledge of the facts, and now that the facts are known the Court cannot and does not accept their conclusions as right or their opinions as sound.

This result really disposes of the motion, but had I been called upon to deal with the respondents' evidence in detail I should have been prepared to hold that they have established that there is nothing in or in the use of any one of the marks contrary to law or calculated to induce the belief in the mind of any ordinarily intelligent and reasonable man that they now hold or ever have held a Royal warrant, or that the mixture in connection with which the two lettered labels are used was either smoked by or supplied to the late King when Prince of

C. A. 1915 IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.* Eve J.

Wales, although in this latter connection it is to be noted that the mixture was in fact at one time regularly supplied to Marlborough House when the late King was resident there and was charged to his account.

I desire further to say, as this is admittedly put forward as a test case, that even if it had been established that these marks were calculated to induce the belief to-day that the respondents hold or have held a Royal warrant, I should not have made any order on this motion. In my opinion s. 11 has no application to, and it would be an abuse of language so to construe it as to make it have any application to, a mark which was in no sense contrary to law when registered and the use of which to-day is identical with that which has obtained ever since it was registered and for years before that. It does not, of course, follow that such a mark might not be so used as to become contrary to law or a deceptive mark within the section, but that is a wholly different case from the present, and I cannot accede to the argument that the Legislature ever intended by s. 11 that the question as to the continuance on the register of an old mark, lawful when registered and honestly and consistently used ever since, should be dependent on legislation passed, for example s. 68 of the Act of 1905 and s. 20 of the Merchandise Marks Act, 1887, or practice adopted, for example Trade Marks Rules, 1906, Nos. 11 and 12, long subsequent to the registration, still less on the existence of inaccurate conclusions brought about not by any deceptive user of the mark, not by any inherent illegality, but by circumstances over which the owner of the mark has no control whatever.

For the reason alluded to just now I have dealt with the case on the merits, but in my opinion neither the applicants nor the individual whose name I was asked to join with them by amendment are persons aggrieved within s. 35 of the Act. At the date when this motion was launched there were no persons holding warrants from the present or any former Prince of Wales. His Royal Highness had not granted any, and all those granted by the late King and by His present Majesty determined on their respectively coming to the throne. The person, if any, aggrieved by the entries was neither the association nor any

individual member thereof, and the attempts made on his behalf prior to the commencement of the proceedings to delegate to the applicants the privilege of asserting his grievance were, in my opinion, futile and inoperative. It is possible that the authority to proceed under s. 68 might be held to have the effect of putting the applicants in the position of an aggrieved person, but this was not given until long after the notice of motion had been served and cannot affect the true position of the applicants at the moment when the proceedings were commenced.

In my opinion the motion fails on all grounds and I dismiss it with costs.

G. M.

C. A.

From this decision the applicants appealed. The appeal came on for hearing on April 28, 1915.

Sir R. B. Finlay, K.C., *Maugham, K.C.*, and *Kerly, K.C.*, for the appellants. The appellants are an Association of Royal warrant holders incorporated by Royal charter with power from the Crown to take proceedings to restrain the unauthorized use of Royal Arms and the Arms of the Royal Family and, with the authority of the Prince of Wales, to restrain the user of the Prince of Wales' badge in a way calculated to deceive. They have obtained the authority of the Prince of Wales to take proceedings in this case.

The marks complained of have all been on the register for at least seven years, but they are not covered by s. 41 of the Trade Marks Act, 1905, because we submit they offend against the provisions of s. 11 of that Act, and so we are applying under s. 35 of the Act for rectification of the register by expunging the marks on the grounds (1.) that they are calculated to deceive and (2.) that they are of such a nature as to be not entitled to be registered. The application is not made under s. 68 of the Act because, the marks being already on the register, the proviso to that section prevents these proceedings from being taken thereunder, but that section tends to show that the appellants are persons aggrieved and are not merely common informers.

[Lord Cozens-Hardy M.R. Your difficulty is to show that you are "a person aggrieved" within s. 35.]

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

We offered in the Court below to join a rival trader as co-applicant, and we are ready to do so now if necessary. We are interested persons because in the performance of our duties we are constantly met with the objection that there are other marks of this sort upon the register. We have an interest under the charter and also by reason of the authority received from the Lord Chamberlain and the Prince of Wales. The effect of the use of these emblems by the Imperial Tobacco Company is to induce the public to believe that the company has the authority or patronage of the Prince of Wales, which it has not, and every one of these trade marks contains representations which the appellants are desirous of stopping as being calculated to deceive. In *In re Royal Worcester Corset Co.'s Trade Mark* (1) Parker J. pointed out that the use of the word "Royal" prima facie suggested Royal patronage.

The authorities given to the appellants to take proceedings show that they are persons substantially interested in having the marks removed from the register within the scope of Bowen L.J.'s test in *In re Powell's Trade Mark.* (2) Any one of the persons who are members of this association could of himself maintain this application.

There is no authority whatever for the proposition that "a person aggrieved" must himself be a trader, and there is nothing in the Act which limits and defines the kind of grievance which may entitle a man to apply: per Earl Selborne in *In re Rivière's Trade Mark* (3); and evidence of great and serious damage is not a condition precedent to the right to apply: *In re Apollinaris Co.'s Trade Marks.* (4)

The Court will not look with any particularity into the question as to who the applicant is who calls the attention of the Court to the fact of the illegal and improper registration: per Romer J. in *In re Wright, Crossley & Co.'s Trade Mark.* (5)

We submit that for every reason the appellants are persons aggrieved within the meaning of s. 35.

Assuming that to be so, then we submit that there never could

(1) [1909] 1 Ch. 459, 467.
(2) [1893] 2 Ch. 388, 406.
(3) 26 Ch. D. 48, 54.
(4) [1891] 2 Ch. 186, 225.
(5) 15 Rep. Pat. Cas. 131, 132.

be any right to register a mark containing a misrepresentation. It is a fallacy to say that before 1905 such misrepresentation as is here alleged was not unlawful. The question is, what is the effect of the misrepresentation upon the mind of an ordinary member of the public? The abuse of the emblem has no doubt been widespread, but it is not true to say that on that account its use conveys no impression whatever. All these marks are misleading. The judgment appealed against involves this: that the unauthorized use of these insignia is so common as to cause them to convey no representation at all. The marks were in fact unlawful at the time of registration. They were obviously intended to induce the belief that the business of the respondents was under the patronage of the Prince of Wales. The respondents have not established that the use of the emblem is so common that it does not connote any authority to use it. Sect. 68 did not effect any alteration in the existing state of the law, it merely provided another and a better remedy.

The respondents rely upon s. 41 of the Act, but that is concerned only with original registration. The submission is that on the true construction of s. 11 a mark should not be allowed to remain upon the register if at the date of registration it was calculated to deceive. We are not applying for an injunction, but we submit that these marks ought not to be upon the register because they are calculated to deceive: *Royal Warrant Holders' Association* v. *Edward Deane & Beal.* (1)

Sir S. O. Buckmaster, *S.-G.*, and *Austen-Cartmell*, for the Comptroller.

Sheldon, for the Attorney-General to the Prince of Wales.

Walter, *K.C.*, and *L. B. Sebastian*, for the respondents, were not called upon to argue.

April 29. LORD COZENS-HARDY M.R. This is an appeal from a decision of Eve J. refusing an application to remove three old marks from the register. The application is made by the Royal Warrant Holders' Association, and two distinct points arise upon it. The first is whether, under s. 35 of the Act, which deals with the rectification of the register, the Warrant Holders' Association

(1) [1912] 1 Ch. 10.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Lord Cozens-Hardy M.R.

are "persons aggrieved." The next is whether, assuming that they are, any case has been made out by the association and their witnesses to justify the removal of these marks. Upon the first point, which to my mind presents very considerable difficulty, I do not desire to express any opinion. I assume, but certainly do not decide in favour of the appellants, that there is no objection to the application on that ground, although it is curious that at the present moment there is no warrant holder from the Prince of Wales in existence, because the warrants held by some members of the association expired when the late Prince of Wales became King, and no fresh ones have been issued. But putting that aside and assuming all that in favour of the appellants, it remains to consider what are the rights of the parties.

Now what is the nature of a warrant granted either by the Crown or by the Prince of Wales? I was under the impression that it was something in the nature of an exercise of a Royal prerogative, but counsel have not been able to suggest any foundation for that, and on the whole I think it is nothing more than an intimation by a proper authority representing the Crown, or in the present case the Prince of Wales, that a particular tradesman is a person who has had dealings with the Prince of Wales in a particular branch of business. Now, when was the first parliamentary recognition of any peculiar right or privilege affecting the warrant holders? So far as our attention has been called to it, and the case has been most carefully and elaborately argued, until s. 106 of the Act of 1883 there was no special provision affecting the Prince of Wales. Then came the Merchandise Marks Act, 1887. That again did not carry the case any further until we come to s. 68 of the new Act, which is in these terms: [The Master of the Rolls read the section and continued:]

Now that is a very wide power, and it contains peculiar provisions for the protection of His Majesty and members of the Royal Family, including the Prince of Wales; but the proviso to the section shows that that power is not applicable to the present case because it enacts that "nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing any such arms, device, emblem, or title to continue to use such trade mark." It is quite clear, therefore,

that the application of the association is prevented by the proviso from coming within the operative part of s. 68.

How then is the case put? First of all, I think s. 68 strongly militates against the present application. It has been forcibly argued that any representation of the Royal Arms in a trade mark is necessarily calculated to deceive. If that be so, it is inconceivable to me that Parliament has put in this proviso, which certainly seems to suggest, and I think must suggest, that trade marks may be perfectly good although they contain arms, devices, emblems, or titles within the first part of s. 68.

Then s. 11 is relied upon. That section provides: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design." That is to say, you must not register a trade mark or part of a trade mark the use of which would be calculated to deceive. Then s. 35 deals with rectifying the register, and I assume that, other difficulties apart, s. 35 is applicable to the present case. Then we go to s. 40, which says: "In all legal proceedings relating to a registered trade mark (including applications under section 35 of this Act) the fact that a person is registered as proprietor of such trade mark shall be prima facie evidence of the validity of the original registration of such trade mark and of all subsequent assignments and transmissions of the same." The marks in question are on the register, and that fact is prima facie evidence of the validity of the original registration. Then s. 41 is in the nature of a statute of limitations: "In all legal proceedings relating to a registered trade mark (including applications under section 35 of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud"—that is out of the question here—"or unless the trade mark offends against the provisions of section 11 of this Act." Sect. 11 is the section which I have read, which says that a trade mark shall not be registered if it is calculated to deceive,

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Lord Cozens-Hardy M.R.

but unless it comes within that, the marks having been on the register for far more than seven years cannot be in any way interfered with.

The marks in question are three in number, the first being No. 538, which is the Prince of Wales' feathers. It was put upon the register as long ago as 1876, nearly forty years ago, and it was said to have been then used for more than ten years before that date; so that it goes back, speaking roughly, for half a century and has been used by the American Tobacco Company or their predecessors in title without interference and without interruption. The second, which is called "The Prince of Wales' Smoking Mixture," and which also contains the Prince of Wales' feathers, was registered in the same year, namely, on February 4, 1876, as having been used since 1869; that again is not far short of half a century. The third is a mark which, it was said, had been used for one year before August, 1875, and it was registered in 1891. That is the "Prince of Wales' Smoking Mixture," the language being the same as in No. 2, there being in addition a picture of the Prince of Wales, who was afterwards King Edward VII. They were all registered as old marks, and registered at a time when there was no statutory prohibition against the use of such marks, and no special protection so far as we know to His Royal Highness the Prince of Wales. Evidence has been adduced in support of the proposition that the mere use of the Prince of Wales' feathers and the name "Prince of Wales" is calculated to deceive to such an extent that the marks fall within s. 11, and on that ground ought to be removed notwithstanding the long user. That is a matter for the Court to consider. The evidence has been carefully gone into by Eve J., and I do not propose to consider it at length again, but I think it is proved beyond all question that the Prince of Wales' feathers have for many years to a very great extent been used by traders of every kind in such a way that the mere use of them does not by itself indicate to anybody with a rational mind that the person so using it is a warrant holder. One of these marks has been used not merely for the number of years stated in the application, but the user goes back to 1827, and I think it is suggested before

that time; 1827 is nearly ninety years ago, and the mark has been used continuously since that date, and used, I may observe, during a considerable period when there was no Prince of Wales at all; and has been used since the registration undoubtedly as a trade mark. Prior to 1875, of course, there was no such thing as the registration of a trade mark, but the mark was used as it seems to me in the nature of a common law trade mark, and would in that character have been entitled to the protection of the Court. I do not propose to go through all the evidence, but I cannot accept the view that the mere user of the Prince of Wales' feathers would lead anybody, if I may borrow the language of Eve J., "who is not living in an atmosphere of warrant holders" to think that it connoted the fact that the person using these marks was a warrant holder. I do not believe it in the least, and it seems to me impossible, having regard to one's knowledge of the world and of what one sees about, to come to the conclusion that any rational person, with no interest in the matter, and who probably had never heard of the Warrant-holders' Association at all, or even of the issue of warrants, could believe that the use of these marks is in any way calculated to deceive. Parliament in its wisdom has no doubt given special protection since 1883, and that protection is now found in the first part of s. 68, and it would no doubt prevent any fresh marks being registered containing the Prince of Wales' feathers. The proviso to s. 68 carefully preserves the rights of persons having registered marks, and I think it would be wrong for this Court to hold that old marks used for so long a time, and on the register, ought to be removed on that ground. The proviso to s. 68 is intelligible only on the ground that persons who brought that clause before Parliament were perfectly well aware that the register was full of trade marks containing the Prince of Wales' feathers, or the Royal Arms, and that being so, it was carefully provided that the rights of those holders should not be prejudiced. In my opinion, before the Act of 1875 there was nothing to prevent the user of the marks, and there was nothing before 1883 to prevent their registration, and that having taken place, in my opinion the view taken by the learned judge was right, and this appeal must be dismissed with costs.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

PICKFORD L.J. I am of the same opinion. The application is made by the Royal Warrant Holders' Association, who were incorporated in 1907, succeeding a previous authority, for the purpose, so far as concerns this case, of preventing "the assumption or use by any person, in connection with any trade business calling or profession, of the Royal Arms (or arms so nearly or closely resembling the same as to be calculated to deceive) or any device emblem or title in any manner which for the time being may not be duly authorised by law," and "to prevent the false representation by any person that any goods are made by a person holding a Royal warrant or authority to use the Royal Arms," and "to prevent the representation by any person without the authority of Us or other lawful express authority that such person enjoys Royal patronage or the patronage of a Government department;" and "to take action for the enforcement of laws affecting the above matters." Those are the purposes for which the association is incorporated which are relevant to this inquiry. Although the corporators are persons in business they are not a trading corporation, and the question raised is whether they have any right to appear on an application under s. 35 as "persons aggrieved." They would of course have a right to appear and take proceedings under s. 68, but if they did so, of course they would be met with the proviso which prevents them from taking proceedings in respect of the use of arms or devices in an old trade mark, and as I gather, the argument was that as in proceedings under s. 68 they would be met by that statutory defence, the presence of the device of the Prince of Wales' feathers in a trade mark was a grievance to them, and therefore they were "persons aggrieved" under s. 35.

I notice that before Eve J. it seems to have been put also in this way: that the association opposed an application by the American Tobacco Company to register the Prince of Wales' feathers, and that this gave them an interest in this case and makes them "aggrieved persons." I express no opinion upon either of these arguments. I do not think that it is necessary in the view that I take of the rest of the case. If the former one be correct, it certainly seems to reduce the utility and protection

of the proviso to the person who has an old mark or device such as this to a very small quantity indeed. I do not say it would entirely destroy it, but it would reduce the protection very considerably, but as I say, it is not necessary and I do not desire to express any opinion upon that. In my opinion it is not proved here that these marks were calculated to deceive at all. I quite accept one argument on behalf of the appellants, which is this, that if any one looking at these marks cannot fail to see that they are calculated to deceive, it is irrelevant to go into the history of how they arose, and it is also irrelevant to see whether a number of other people have used the Prince of Wales' feathers. I quite accept that argument, but it seems to me to go to this, that if you accept the conclusion you need not look at the evidence, and I think it is of importance to see the circumstances under which the mark came into existence, and also the way in which this emblem of the Prince of Wales' feathers has been used, in order to come to the conclusion whether it is calculated to deceive or not. I do not say that the history or the user by other persons is conclusive at all, but it is a matter that is relevant and is to be considered. Now I have no doubt that this emblem of the Prince of Wales' feathers has been used by these respondents and their predecessors in title for over fifty years. I have also no doubt that in a great measure in that part of the country where these tobaccos are chiefly sold the feathers have come to be associated a great deal more with what were Messrs. Franklyn & Co.'s goods than they have for this purpose with the Prince of Wales, and I think it is extremely likely that what is said in one of the affidavits is true, namely, that where you have a similar brand, for instance "Bishop Blaze," upon different tobaccos, the Prince of Wales' feathers are looked upon as distinguishing the "Bishop Blaze" tobacco as being manufactured by this company, whereas the "Bishop Blaze" tobacco with a star upon it represents the "Bishop Blaze" tobacco manufactured by Messrs. Wills. Those are the ideas which to my mind are much more likely to be produced, at any rate in the part of the country where most of these tobaccos are used, than any suggestion of the Prince of Wales smoking this mixture, or

BIBL. LONDIN UNIV.

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Pickford L.J.

it ever having been supplied to him, or any authority having been given by him for the use of the emblem. That the Prince of Wales may object, and does most properly and reasonably object, to the indiscriminate use of any badge belonging to him as a commercial advertisement, I should think is quite true, and it could hardly escape his objection, but that does not show that it is calculated to deceive, or that under the present state of the law the Royal Warrant Holders' Association can have the emblem removed from the trade mark. It is a matter, no doubt, upon which different persons may very reasonably take different views. We have had the record of the application by the American Tobacco Company before the Comptroller produced before us, and there is no doubt that he expresses the opinion that this is a thing calculated to deceive, but it seems to me clear that that is not the view that has always been taken, because we have had produced to us a book full of trade marks registered before 1883, when protection was first given to the Royal Arms, all registered, whether with or without objection we do not know, but all registered trade marks containing this emblem, and one can hardly think that if the Comptroller of that day held the same opinion all these marks would have been registered. Looking at the marks as we were invited to do, and looking at the history of them, I should have come to the conclusion, apart from the evidence, that there was no reasonable probability of anybody being deceived into thinking that this was tobacco supplied to the Prince of Wales, or that he had given authority to put this emblem upon the trade mark, and although I think that the use of the words "trade mark" is not conclusive, I should agree with Eve J. that when the device is put upon a trade mark and called a trade mark it is less likely to be taken as conveying that there is an authority to use it, or that the persons using it are suppliers, or purveyors, to the Prince of Wales; and the fact that the words "by appointment" are very commonly though by no means universally used by those persons who hold warrants and have the right to supply is also I think to be taken into consideration. If you find the device used as a trade mark, used with the words "trade mark," and used without the words "by appointment," it seems to me to go some

way towards showing that nobody would think that the use of the plume of feathers, even with the motto attached to it, conveyed that the articles were supplied to the Prince of Wales or that he had authorized the use of that plume of feathers. That certainly is the view I should have taken prima facie looking at the matter myself, but of course we cannot disregard the evidence. There are a great many affidavits. I have already alluded to the difficulty that one must have in dealing with a number of affidavits which express exactly opposite opinions, and the deponents of which are not subjected to cross-examination, which would show the circumstances under which those opinions were formed. I must say, considering the number of years that this trade mark, whether registered or not, has been in use, that I am surprised, as Eve J. was, that no customer except one, who was the earliest president of the Royal Warrant Holders' Association, has been produced to say that he did think that this tobacco was supplied to the Prince of Wales, or supplied under the authority of the Prince of Wales to his household. I know it is not necessary to show that people have been deceived, and that it is sometimes difficult to get persons to say that they have been deceived, but I should have expected, considering the quantity of this kind of tobacco which has been sold and considering the number of years the mark has been used, that the appellants might have been able to find some customer as a witness outside the Warrant Holders' Association. Now, with regard to nearly all of the witnesses for the applicants this may be said, that they had never seen or heard of or dealt with this trade mark until it was produced to them for the purpose of saying whether it was misleading or not. I do not say that that reflects upon their bona fides at all, but I do say this, that when some article is produced in order to ascertain whether you can find in it some particular thing which you are told to look for, you are very much more likely to find it than if you come across the article in the ordinary way. In the case of the evidence for the respondents, some of it is evidence of the same sort, but a great deal of it is evidence of people in the trade who have been dealing in this brand of tobacco for many years, and who are able to say that no suggestion has ever been made to them that

C. A. 1915 IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.* Pickford L.J.

the use of this emblem conveyed that the tobacco upon which it was used was tobacco supplied to the Prince of Wales, or that there was any authority to supply it to the Prince of Wales. It may not go very far, but to my mind it goes some considerable distance, because one would have thought, certainly amongst the retail traders and dealers who have given evidence, that if it were the case they would have been able to speak to persons who casually buying the tobacco had said "I see this is the sort of thing supplied to the Prince of Wales," or "This is the sort of thing he gives you an authority to supply"; but no one of them has ever heard a suggestion of the kind, and I certainly think the evidence for the respondents outweighs the evidence of the applicants and tends in the same direction that my own inclination would have led me without the evidence.

I have only spoken about the badge of the Prince of Wales' feathers. We have also been referred to the fact that the name of the Prince of Wales has been used, but I cannot think that any reasonable person could say that he was deceived, and to my mind it is not possible here to hold that the mere fact of describing the tobacco as "the Prince of Wales' mixture" would lead any one to think it was what the Prince of Wales originally smoked, or which was supplied to him. We know that all kinds of things are called by the names of prominent people as long as the vogue lasts. I have no doubt whatever that many kinds of articles are at the present moment described by the names of persons distinguished in the war, but no one imagines that that practice means anything more than giving those articles an attractive name, and I cannot imagine there is anything more than that in using the name of the Prince of Wales. We were also referred to another instance of the way in which different things strike different people; we were referred to an announcement in the *Tobacco Trade Review*, in 1872, as showing that the words "Prince of Wales" would mean that it was connected with the Prince of Wales. Now, it strikes me that the meaning of that notice is exactly the opposite. It is as follows: "Messrs. Fryer & Coultman, the Tower Tobacco Company, 2 and 3, West Smithfield, have introduced to the trade a new packet article called the 'Prince of Wales' mixture.' The quality of the tobacco is good

and the mixture will no doubt receive considerable patronage from the smoking community. If the manufacturers push the sale of this mixture by allowing a liberal discount to the trade there ought to be a good deal of it smoked on Thanksgiving Day." Now, it is called a new article in words. I should have thought that that was as clear an intimation as could be to anybody that it was not a tobacco that the Prince of Wales had been in the habit of using, and as I say, the use of the name "Prince of Wales" to my mind does not carry it any further, if so far, as the use of the Prince of Wales' feathers ; and as for the portrait of the Prince of Wales, if any one recognized it, I do not think it would convey any more to them. It is quite possible they might not recognize it at all, but if they did I do not think it would carry it any further than the name of the Prince of Wales, and therefore I think here that these trade marks were not calculated to deceive, and that therefore this appeal fails and should be dismissed.

WARRINGTON L.J. This is an application under s. 35 of the Trade Marks Act, 1905, by persons who allege that they are aggrieved by certain entries made in the register of trade marks without sufficient cause, or wrongly remaining on the register. The applicants are the Royal Warrant Holders' Association. They are a body incorporated by Royal charter, and their corporators are the holders of Royal warrants. [The Lord Justice then alluded to the objects of the association and continued :] In the year 1906 the present applicants were authorized by the Lord Chamberlain to take proceedings under s. 68 of the Trade Marks Act, 1905, against any person or persons acting in any way contrary to the said section. As at present advised, I am certainly not satisfied that the learned judge was right in the conclusion to which he came that the applicants were not "persons aggrieved." The point has not been fully argued before us and therefore I express no definite opinion about it, but as at present advised it seems to me that they had a sufficient grievance in this, namely, that so long as the mark remained on the register their proceedings under the first part of s. 68 might be rendered less easy and convenient. At any rate I will assume

C. A. 1915

IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re.*

Warrington L.J.

for the present purpose that they can properly be treated as "persons aggrieved" by the present state of the register.

They seek to have certain entries expunged from the register on the ground that those entries were made therein without sufficient cause. The three trade marks in question were registered respectively on January 11, 1876, February 4, 1876, and September 16, 1891. They have been therefore for a very long time upon the register, and what is more, they were all three registered as old marks, one as having been used more than ten years before January 8, 1876, and the second seven years before September 22, 1876, and the third for over one year before August 13, 1875. They are all registered as old marks. The ground upon which the applicants say that the marks were wrongly entered on the register is that they come within the description in s. 11 of the existing Trade Marks Act of marks the use of which would, by reason of their being calculated to deceive, be disentitled to protection in a Court of justice. The appellants have to make out, therefore, that the use of these marks would be calculated to deceive.

The particular kind of deception which they suggest would be likely to be brought about by the use of these marks is that people generally seeing the marks upon these goods might be led to believe either that the persons putting the goods upon the market were in the privileged position of warrant holders to the Prince of Wales, or that the goods contained in the packets, upon which these marks appeared, were goods supplied for the use of the Prince of Wales. That is the particular deception suggested. What are the marks? The first mark contains simply the three feathers, the base of them surrounded by a coronet, and having the well-known motto "Ich Dien," the motto of the Prince of Wales, on a scroll. It is undoubtedly the badge of the Prince of Wales. The second mark contains the same badge, but has on it in addition the words "The Prince of Wales' Smoking Mixture." The third mark is identical with the second, except that it also contains the representation of a man's head, which presumably is intended to be that of Albert Edward Prince of Wales, afterwards King Edward VII. Those are the marks.

I ask myself first of all, without knowing anything more about the case, but treating myself, as I think I am entitled to do, as knowing something about the ways of the world and the ways of tradespeople, and the ways of people who buy goods, whether, if I saw the Prince of Wales' feathers on a packet of goods, used as a trade mark, it would suggest to me that that meant to represent, or was calculated to lead to the belief, that the person who put that mark upon the goods held some special warrant or authority from the Prince of Wales. I do not think it would for a moment. What it would suggest to me would be that the person using it thought it was an attractive mark connected with a popular person, and that it was a mark which would make his goods not only attractive, but, more than that, would distinguish his goods from the goods of other people in the same trade. With regard to the use of the words "The Prince of Wales' Smoking Mixture" I am quite certain that it could never have struck me for a moment that that meant either that Albert Edward Prince of Wales smoked that particular tobacco or that that particular tobacco was supplied to his household or under his orders. Still less would the representation of the man's head on the other label have been calculated to raise any such belief. That is what would have been my state of mind merely on the view of the mark.

Now I come to the evidence, to see whether there is anything in it which would prevent me from expressing my own opinion on the matter. The evidence is, first, that from the earliest times, treating as the earliest times the first Trade Marks Act of 1875, soon after the passing of the Act of 1875 there have been—I do not hesitate to use the expression—any number of Prince of Wales' feathers and similar designs on the register in respect of all kinds of goods. One has only to look at the book which we have had before us to find that in connection with china, woollen yarns, leather, edged tools, needles, sewing silk, paper, cigarettes, and a number of other things the Prince of Wales' feathers have been used as a trade mark. That of itself goes a long way to displace any idea that one might previously have had that the use of such a mark could suggest any connection with the Prince of Wales or his household. But the evidence in

C. A. 1915 IMPERIAL TOBACCO COMPANY'S TRADE MARKS, *In re*. Warrington L.J

support of the applicants' view is, to my mind, singularly unconvincing. It is the evidence of people many of whom no doubt are Royal warrant holders, and a Royal warrant holder knows all about Royal warrants, and knows about their value, and knows how the people who hold them are in the habit of representing that they do hold them, and it is perhaps not altogether surprising that a warrant holder being shown these marks, and knowing nothing whatever about them except that they are used upon goods, should come to the conclusion that the marks are calculated to represent that the goods are put forward by the class of which he is a member, and the membership of which he regards as of some value to himself. There are some other witnesses who are not warrant holders, but with regard to them one has not had an opportunity of hearing what they might say on cross-examination as to how the particular opinion was extracted from them, and whether they knew before they gave that opinion the facts relating to the use by other people of the Prince of Wales' feathers or anything of the sort. The opinion seems to me to be really of very little value indeed; but on the other hand we have a very large body of evidence, not only as to the facts with regard to the use of the Prince of Wales' feathers and the name of the Prince of Wales, and so forth, but with regard to the habits of the people in this particular trade, and all I think it is necessary to say with regard to that is that I am entirely unconvinced by the evidence on the part of the applicants that these marks are calculated to deceive, and I am convinced by the affidavits filed on behalf of the respondents that the opinion which I should myself have formed on the view of the marks is the correct one.

In my opinion these marks are not calculated to deceive, and that is the only ground upon which it is suggested that the register ought to be rectified. In my judgment Eve J. was quite right in dismissing the application.

Solicitors: *E. D. Tillett; McKenna & Co.; The Solicitor to the Board of Trade; The Solicitor to the Duchy of Cornwall.*

G. A. S.

HERBERT MORRIS, LIMITED *v.* SAXELBY.

[1914 H. 701.]

C. A.
1914
SARGANT J.
Oct. 13, 14, 30.
1915
C. A.
March 8, 9, 10, 31.

Restraint of Trade—Special Branch of Engineering Business—Employer and Servant—Restraint for Seven Years extending to United Kingdom—Interests of Servant and Public.

The plaintiffs were makers of certain special classes of lifting machinery, having their head office at Loughborough and branch offices in England, Wales, and Scotland, and having a traveller but no branch office in Ireland. They had devoted a great deal of labour to the organization of this class of business both from a manufacturing and commercial standpoint. In 1901 the defendant, being then fifteen years of age, entered the plaintiffs' employment as a junior draughtsman, and in 1906, having already attained the position of a leading draughtsman, he was required, immediately after attaining the age of twenty-one years, to enter into an agreement for a like period and substantially similar to that below mentioned. In 1909 he was employed in the selling as well as the engineering department, and in 1911, on taking charge of the selling department at Loughborough and while still bound by the agreement of 1906, he entered into a written agreement with the plaintiffs whereby he agreed that he would not for seven years from the date of his ceasing to be employed by the plaintiffs either in the United Kingdom of Great Britain or Ireland be concerned in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, and hand overhead travelling cranes, or any part thereof, or be concerned or assist as aforesaid in any business connected with such sale or manufacture. The defendant's training and experience in the plaintiffs' employment had been entirely in this branch of engineering. The defendant subsequently left the plaintiffs' employment and entered into that of a rival firm admittedly in breach of the agreement. The plaintiffs sued for an injunction. The only defence was that the agreement was in undue restraint of trade:—

Held by Sargant J., that, though from the point of view of the employers alone the agreement was not unreasonable as regarded either space or time, from the point of view of the employee and the public, if the injunction were granted, both the defendant and the public would be deprived of a great deal of the skill and experience which the defendant had acquired in the course of his training and service with the plaintiffs; that the knowledge so acquired was not knowledge of a confidential character acquired on behalf and for the benefit of the plaintiffs, but was part of the general mental equipment of the defendant, and that the agreement was therefore in undue restraint of trade and void.

In determining the question of the reasonableness of a restrictive covenant between employer and employee the interests of the employer

C. A.
1915
HERBERT MORRIS, LIMITED v. SAXELBY.

are not the only element to be considered, but there must also be taken into account the oppressiveness of the restriction on the employee, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered.

Held by the Court of Appeal (Lord Cozens-Hardy M.R. and Joyce J., Phillimore L.J. dissenting), affirming the decision of Sargant J., that although the agreement might be of some advantage to the plaintiffs in restraining competition, yet when regarded from the point of view of the defendant and of the public in general, it was not reasonable and ought not to be enforced.

Semble, that it was wholly unreasonable to require an employee immediately upon attaining the age of twenty-one years to enter into such an agreement.

WITNESS ACTION.

The following statement of facts is taken from the written judgment of Sargant J.: "In this action the plaintiffs are seeking to restrain the defendant, a former servant of theirs, from being concerned in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, and overhead travelling cranes, or any part thereof. They have also claimed to restrain him from divulging or using confidential information acquired by him while in their service, but this latter claim was abandoned on the opening of the plaintiffs' case, inasmuch as they had no evidence to show that the defendant had committed any breach of any obligation of the kind. The plaintiffs are very successful makers of the classes of lifting machinery I have just mentioned. Their business is a highly specialized one. There are certain other kinds of machinery which they make or sell. But the special classes of machinery in respect of which they seek a prohibition against the defendant comprise some three-fourths of the plaintiffs' business. In these special classes of machinery the plaintiffs would appear to be the premier firm in the United Kingdom, and to have a business spread over a large part of the kingdom. They have their head office at Loughborough, and branch offices in London, Manchester, Birmingham, Leeds, Sheffield, Newcastle, Cardiff, and Glasgow. They have no branch office in Ireland, but have a traveller there.

"The plaintiffs have devoted a great deal of labour to a most thorough organization of their business, both from a manufacturing and commercial standpoint. They have devoted time and

money to the standardization of the various parts which are common to their different types of machines. They have got out and arranged in the most careful and systematic manner very large numbers of cards called "E" cards, which, to use Mr. Herbert Morris's language, give details of manufacturers, charts of strength of materials, and a large amount of technical experience due to the work of the company and their servants. They have drawings, called "L" sheets, comprising tables and plotted curves indicating the composition and dimensions suitable for particular jobs. They have also drawings of special machines, and an elaborate system of indexing the costs involved in every piece of machinery turned out by them, and, further, they have elaborated a most minute system of tabulating details with regard to every job obtained or tendered for, and have kept records of all the various sets of instructions which have from time to time been given out as to the method of doing various kinds of work. From the purely commercial side again they have collected and tabulated information as to the requirements of existing customers and the probable requirements of prospective customers, the object being both to keep a record of the work done for any actual customers and to determine what parts of the plaintiffs' advertisements may be most usefully sent to particular traders. The documents in which all the foregoing information is tabulated are, of course, highly confidential; and though they have to be handed out from time to time to the plaintiffs' employees, precautions are taken for ensuring that they are traced and returned. On the other hand, the information contained in these documents is so minute and detailed that it would be impossible for an employee to carry it away in his head. The only knowledge that he can retain is that of the general character and principles of this elaborate scheme of organization.

"The defendant was born on July 12, 1885, and accordingly attained the age of twenty-nine years last July. In February, 1901, when between fifteen and sixteen years of age, he entered the plaintiffs' employment as a junior draughtsman in their drawing office. He showed ability, and before he attained the age of twenty-one years in July, 1906, had attained the position of leading draughtsman in the department to which, I gather, he

C. A. 1915 — HERBERT MORRIS, LIMITED v. SAXELBY.

had throughout been attached, namely, that dealing with pulley blocks, hand overhead travelling cranes, and hand overhead runways; but he had not to do, so far, with electric overhead runways. His salary was then 50*s.* a week. Immediately on his attaining twenty-one he was required to sign an agreement, which was dated July 16, 1906, and contained a prohibitive clause similar to the clause which forms the foundation of the present action, but which did not mention electric overhead runways. In March, 1908, the defendant went to the plaintiffs' branch at Cardiff as resident engineer, and he remained there till February, 1909. So far, the defendant's knowledge had been limited to the engineering side of the business, and he had become a competent and useful man in that department. But in February, 1909, he was sent to the London branch to take part in selling, and he was for a time the manager of the London branch. During that time the following incident happened to which some importance attaches, namely, the plaintiffs had, in January, inserted an anonymous advertisement in the *Engineer*, in the following terms, namely: 'First-class man wanted to control publicity and advertising department of well-known engineering works. Only men of real ability will be considered. Full particulars of experience, age, and salary to 72, *Engineer* office, 33, Norfolk Street, Strand, W.C.'; and to this advertisement the defendant sent the following answer, namely: 'Dear Sirs,—Having the necessary qualifications, I offer myself as candidate for the vacant position as advertised in the current issue of *Engineer*. Age twenty-five. My experience consists of nine years with Messrs. Herbert Morris & Bastert, Limited, Loughborough, whose phenomenal success, due to up-to-date business methods, is well known. This has been combined with an aggressive circularizing policy. I have held the following positions:—Chief draughtsman, correspondence clerk, and South Wales representative. My present position is London manager, and in this capacity I have good connection with Admiralty and Government officials, City merchants, shippers, and consulting engineers. Salary required 225*l.* to 250*l.* per annum. I would be pleased to give further particulars at an interview.' Apparently the defendant was spoken to as to this letter, and probably remonstrated with, but

there the matter dropped. The importance of the letter lies both in the claim by the defendant to have the necessary qualifications for a general engineering post and also in his claim to a good connection. Such connection, if any, as he had was entirely derived from his employment by the plaintiffs.

"In the year 1910 the defendant left London to take charge of the selling department at Loughborough in connection with pulley blocks and Admiralty contracts, and he continued there until he left the plaintiffs' service in April, 1913. On March 17, 1911, he entered into the agreement now in question; under that agreement his salary was 3*l.* 17*s.* 6*d.* a week, and his engagement was for two years certain, and was thereafter to be subject to four weeks' notice on either side. The prohibitive clauses in that agreement on which the present action is brought are as follows: '(6.) The employee shall not, during his employment nor at any time afterwards, divulge nor communicate to any person, corporation or firm, any information which he may receive or obtain in relation to the company's affairs and customers, and all instructions, drawings, notes and memoranda made by the employee, or which may come into his possession while engaged as aforesaid, shall be the exclusive property of the company. (7.) In consideration of the agreement hereinbefore contained, the employee covenants and agrees with the company, their successors and assigns, that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company, whether under this agreement or otherwise howsoever, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly, or in connection with any other person, firm or company, or be concerned or assist directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes, or any part thereof, or be concerned or assist as aforesaid in any business connected with such sale or manufacture.' It is the latter of these two clauses which is the important one for present purposes.

"In March, 1913, the defendant, having been unable to obtain from the plaintiffs such an advance in his remuneration as he

C. A. 1915

HERBERT MORRIS, LIMITED v. SAXELBY.

considered adequate, gave notice to terminate his engagement in the following April, and he at once went to France and entered the employment of Messrs. Derome, the French agents of the plaintiffs. The defendant has been criticized with some severity for entering this employment at all, and particularly for the way in which he stated his qualifications for the post in a letter to Messrs. Derome dated February 25, 1913. But I do not think that either criticism is justified. The defendant could obviously employ his training to the best advantage only by occupying himself in the same class of business in which he had been engaged during the whole of his working life, and the terms of his agreement left it open to him to do so in a foreign country; and after having carefully studied the terms of the letter in question I cannot find that the defendant is going further than to lay stress on the personal business qualifications he has acquired by his experience and training in the plaintiffs' employment The letter does not seem to me to contain any offer or suggestion of a transfer of business connection or goodwill acquired on behalf of the plaintiffs. The defendant did not find his surroundings in France quite congenial, and he left his employment with Messrs. Derome at the end of February, 1914. It had been a term of his engagement with them that he should not re-enter the service of the plaintiffs. He did, in fact, on March 9, 1914, enter the service of Vaughan & Son, Limited, a Manchester firm who are the principal competitors of the plaintiffs in the manufacture of pulley blocks, and some, or all, of the other articles mentioned in clause 7 of the agreement of March 17, 1911. This was, of course, a clear breach of the terms of that clause, and its immediate consequence was the commencement of this action. The defendant's defence is that the clause is not binding on him as being unduly in restraint of trade."

The action came on for hearing before Sargant J. on October 13, 1914.

Walter, K.C., and *Kerly*, K.C., for the plaintiffs. The plaintiffs' case is confined to the breach of clause 7 of the agreement of March 17, 1911. It is said that that clause is in undue restraint of trade, but the plaintiffs' business is of a very special

character extending over the whole of the United Kingdom and involving a great deal of secret information necessarily coming before their leading servants. The position of the defendant was one which justified a very stringent agreement on his part extending to the whole of the United Kingdom, and the clause in question is one which ought to be upheld in accordance with the principles laid down in *Mason* v. *Provident Clothing and Supply Co.* (1); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2); *S. V. Nevanas & Co.* v. *Walker* (3); *Eastes* v. *Russ.* (4) The prohibited field of employment is a narrow one and the knowledge and experience gained by the defendant will be available to him in other branches of engineering. As regards the construction of the agreement *William Cory & Son* v. *Harrison* (5) shows what is meant by the words "be concerned or assist directly or indirectly." The words "or any part thereof" refer to any substantial part, or if they have any larger significance they can in any case be severed from the rest of the clause referring to the articles themselves.

Romer, K.C., and *W. R. Sheldon*, for the defendant. Clause 7 of the agreement is in undue restraint of trade. This is not a case in which the plaintiffs' customers are being taken away, nor is any secret process involved. The training and experience which the defendant has acquired in this branch of engineering in the plaintiffs' employment are part of his mental equipment which he is entitled to take away with him and make the best use of on leaving their service. It is "subjective" and not "objective" knowledge according to the distinction drawn by Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (6), approving the judgment of Farwell L.J. in *Sir W. C. Leng & Co.* v. *Andrews.* (7) See too *Eastes* v. *Russ.* (4) [They also cited *Henry Leetham & Sons* v. *Johnstone-White* (8), where the Court of Appeal reversed the decision of Neville J. (9)] The class of business to which clause 7 relates is the branch of engineering in which the defendant has specialized, and it is too late in life to ask him to

(1) [1913] A. C. 724.
(2) [1894] A. C. 535.
(3) [1914] 1 Ch. 413.
(4) [1914] 1 Ch. 468.
(5) [1906] A. C. 274.
(6) [1913] A. C. 724, 740.
(7) [1909] 1 Ch. 763.
(8) [1907] 1 Ch. 322.
(9) [1907] 1 Ch. 189.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY.

specialize in another branch in which he would have to start again at the beginning. If an injunction is granted the defendant will be unduly fettered and the public will be the losers. A restrictive covenant based on a desire to avoid competition is bad. As to the construction of the language of clause 7 the words "any part thereof" go far beyond anything reasonably required for the protection of the plaintiffs and are not severable.

[SARGANT J. I think that those words mean any substantial part, and therefore that question does not arise.]

Walter, K.C., in reply. An agreement between employer and employee may have regard to the prevention of competition to the injury of the plaintiffs' business. The personal connection of the plaintiffs with customers in these classes of machinery is something in the nature of property which the defendant is not entitled to take away to a rival firm. The defendant is not precluded from earning his living in any other branch of engineering. [He referred to *Haynes* v. *Doman*. (1)]

Cur. adv. vult.

1914. Oct. 30. SARGANT J. delivered the following written judgment, in which, after stating the facts as above set out and that the defence was that clause 7 was not binding on the defendant as being unduly in restraint of trade, his Lordship continued: To determine whether this defence is well founded I have to consider, in the words of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (2), whether "the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master" are "greater than are reasonably necessary for the protection of the master in his business"; or, in the rather more elaborate language of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3), whether "the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public." Further, in determining this question of reasonableness I think that the interests of the employer are not the only element to be considered, but that I

(1) [1899] 2 Ch. 13. (2) [1913] A. C. 742.
(3) [1894] A. C. 565.

may and ought to take into account the oppressiveness of the restriction on the servant, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered. The opinion expressed by Neville J. to the contrary in *Henry Leetham & Sons* v. *Johnstone-White* (1) seems to me to be hardly consistent with the very general language used by Lord Macnaghten in the passage above cited, and to be at variance with the broader spirit in which the matter was subsequently approached by the House of Lords in the recent case of *Mason* v. *Provident Clothing and Supply Co.* (2) and by the Court of Appeal in the still later case of *Eastes* v. *Russ.* (3)

From the point of view of the employers alone I am not prepared to say that the agreement here is unreasonable as regards either space or time in the sense that it might not be some advantage to the plaintiffs to prevent the defendant from engaging in work of the kind prohibited to the full extent of the space and time prescribed. The class of work is so special, the competitors are so few, and the branches of the plaintiffs are so widely extended through the manufacturing districts of England itself that I think competition in any part of the United Kingdom might result in damage to the plaintiffs. And if the question were one, as in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (4), between a vendor and a purchaser, I should feel compelled to give effect to the contract.

On the other hand from the point of view of the employee and the public it is of the very greatest importance to note that the restriction is universal in regard to space as extending to the whole of the United Kingdom, and that it is for the very considerable period of seven years, a period that is hardly practically distinguishable from the whole life of the defendant in this case, since in the course of such a period he would necessarily have to earn his living in some other kind of business, and could hardly subsequently return with any hope of success to his original employment. This universality of the restraint in my judgment throws a very heavy

(1) [1907] 1 Ch. 194.
(2) [1913] A. C. 724.
(3) [1914] 1 Ch. 468.
(4) [1894] A. C. 535.

C.A. 1915 — HERBERT MORRIS, LIMITED v. SAXELBY. — Sargant J.

burden of justification on the plaintiffs, and one which, as I gather, their counsel would have found too heavy for them had the nature of the business in which the defendant was forbidden to engage been of a more general character. The argument of the plaintiffs on this point, as I understood it, was that the prohibited field of employment was very narrow, that the knowledge and experience gained by the defendant would be available for him and of great value in all other branches of engineering both from the manufacturing and the commercial side, and that consequently neither he, nor the public, would suffer substantially from the prohibition. There is a good deal of weight in this argument, but I do not think it conclusive. The defendant has, in fact, been trained throughout in this particular branch of engineering and no other. The very specialization which narrows the field of prohibited employment is a factor against the qualification of the defendant to undertake engineering work of a different and more general kind. And though the principles of designing may be the same in many branches of engineering, he cannot, to use his own illustration, design a pump because he does not know the details of a pump; he does not know the commercial article a pump as manufactured for the various purposes for which it is used. This disqualification seems to me to extend to the commercial side of the business also, though not to the same extent. And I am satisfied that, if an injunction is granted against the defendant as asked, he and the public will be deprived of the benefit of a great deal of the skill and experience which he has acquired in the course of his training and service at the plaintiffs' works, that he will have to make a fresh start in learning some similar business at a point quite definitely lower than that which he has legitimately attained in the prohibited business, and that both his efficiency and his power of earning will be most materially impaired.

There is also another aspect from which the matter must be viewed, namely, the kind of knowledge which it is proposed to prohibit the defendant from using. Is it knowledge of a confidential character really acquired on behalf and for the benefit of the employer, such as knowledge of the personal connection of the employer with customers, knowledge such as Lord Shaw

in *Mason* v. *Provident Clothing and Supply Co.* (1) calls "objective" knowledge? Or is it knowledge which forms part of the general mental equipment of the defendant and properly belongs to him, knowledge such as Lord Shaw there calls "subjective" knowledge? If it is the latter, I think it clear from the reasoning of Lord Shaw, and still more clear from two passages, which I will read, from the judgment of Phillimore L.J. in *Eastes* v. *Russ* (2), that the restriction on the user of such knowledge is illegitimate. The Lord Justice says this: "The legitimate object of the clause is to prevent the defendant from using in competition with the plaintiff the connection which he has acquired during his period of service and any personal knowledge of clients which would assist him in obtaining or handling a practice." Then lower down on the same page he says this: "In cases where there is no question of sale of goodwill is an employer entitled to a covenant which will eliminate his former employee from the list of possible competitors for all time and over the whole area of his practice, or is he only entitled to a covenant so limited as to time and place as to deprive the employee of any and every benefit which might accrue to him in the way of connection or reputation or personal knowledge of the customers, and so strip him bare of all advantages and put him on the same level as a stranger? On reflection I think that the latter is the true view."

Now here I have come to the conclusion that it is the user of knowledge of the second kind which under the circumstances of the present case is practically forbidden by the restriction in question. I cannot find, notwithstanding the claim in the defendant's answer to the advertisement in the *Engineer*, that he had acquired, or could make use of, any effective connection with customers of the plaintiffs. Indeed Mr. Herbert Morris in his evidence did not put the apprehended damage to the plaintiff company on any ground of this kind, but on the ground of the severe competition that might be experienced if the defendant went into the service of a rival. In cross-examination when speaking of the possible employment of the defendant by a particular suggested company Mr. Morris said: "The company chiefly make overhead runways; they don't make them in the

(1) [1913] A. C. 740. (2) [1914] 1 Ch. 490.

C. A. 1915

HERBERT MORRIS, LIMITED v. SAXELBY.

Sargant J.

best fashion; with the assistance of the defendant they might improve and become more formidable competitors. The defendant has better knowledge than they. The defendant might convey to them the knowledge gained in our employ. I think we had taught the defendant to be a better workman than their employees. That is the only reason why I should object." Immediately afterwards, speaking with reference to the possible employment of the defendant by another competing firm, Mr. Morris's evidence was as follows: "We should be injured because he could teach them much gained from his experience with us. Their methods are antiquated. I object to their being instructed in our particular methods. Defendant could do this with regard to the productions made at our works. He could introduce our sheet system —the method by which we produce them and the formulas we use. We have gone past Molesworth and laid down formulas of our own. We don't want these told our rivals. Secret information covers these and other things. (Q.) Suppose defendant goes into that employ and loyally keeps his obligation not to communicate? (A.) If he used his knowledge he would do us harm, if not, he would be no use—this is as to the particular things. I object to his using as well as to his divulging." And a little latter Mr. Morris said this: "I should object to defendant doing business in these things in Ireland even for Ireland alone. I should feel his competition. I want to avoid competition as far as possible. That is not entirely the reason for having these agreements. I don't mind competition in the ordinary course of business, but do mind it by persons who have gained experience with us."

Subtracting from this evidence what refers to detailed information and formulas not contained in the ordinary textbooks such as Molesworth (and all this information is such as admittedly cannot be carried away by the defendant in his head, and is not now suggested to have been carried away by him in writing), Mr. Morris seems to me to be here claiming to prevent the defendant from using in competition with the plaintiffs the experience and skill which he has acquired in the plaintiffs' employment. This claim is, in my judgment, an illegitimate one, and none the less so because the defendant's skill and experience

are entirely derived from his employment with the plaintiffs and their predecessors in business. On this point it is in my judgment a most material fact that the defendant had previously been called on to sign a similar agreement immediately on attaining twenty-one, and when he had merely had experience as a draughtsman and had not been introduced to the commercial side of the business, or brought into contact with the customers of the business. At that time, at any rate, the knowledge of the defendant was, to use Lord Shaw's distinction, "subjective" and not "objective"; and it was the competition that might arise from this subjective knowledge that was being guarded against.

The case is not one in which there would appear to be anything in the nature of trade secrets as opposed to the tabulated confidential information to which I have already referred; and the evidence of persons engaged in businesses of this kind (which is pointed out by Lord Haldane in *Mason* v. *Provident Clothing and Supply Co.* (1) as being some guide in the consideration of the requirements of any particular business that may be in question) points to its being altogether unusual to impose restrictions on employees such as the defendant. The plaintiffs' organization is a most efficient one, and in this, as in other respects, they are straining every nerve to secure or retain advantages over their competitors. This they are, of course, as a general rule fully entitled to do; but in the present case they seem to me to have pushed their policy to an extent which is unreasonable to the defendant and prejudicial to the public and which ought not to be supported in this Court. Accordingly I must dismiss this action with the usual consequences.

A. C.

C. A.

The plaintiffs appealed. The appeal was heard on March 8, 9, and 10, 1915.

Sir R. Finlay, K.C., *Walter, K.C.*, and *Kerly, K.C.*, for the appellants. The question is whether the protection given by the covenant is greater than the person in whose interest it is given can reasonably require: *Rousillon* v. *Rousillon* (2); and

(1) [1913] A. C. 732. (2) (1880) 14 Ch. D. 351.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY.

cases of master and servant must be dealt with on the same footing as those between vendor and purchaser of a goodwill. The principle stated in *Rousillon* v. *Rousillon* (1) is derived from *Hitchcock* v. *Coker* (2); *Ward* v. *Byrne* (3); *Tallis* v. *Tallis* (4); *Mallan* v. *May*. (5) It was adopted in *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (6) and *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (7); *Dubowski & Sons* v. *Goldstein* (8), where the agreement was held to be severable; *E. Underwood & Son* v. *Barker* (9); *Haynes* v. *Doman* (10); *Henry Leetham & Sons* v. *Johnstone-White* (11); *Sir W. C. Leng & Co.* v. *Andrews* (12); *Mason* v. *Provident Clothing and Supply Co.* (13); *S. V. Nevanas & Co.* v. *Walker & Foreman* (14); *Eastes* v. *Russ* (15); *Millers* v. *Steedman*. (16)

All contracts which simply restrain the right of a man to undertake work are bad in law on the ground of public policy; but contracts restraining a man from undertaking certain sorts of work may be good. Such contracts have been allowed in at least two classes of cases, namely, (first) contracts prohibiting a person who has sold the goodwill of his business from doing work which will damage that goodwill, and (secondly) contracts prohibiting persons who, in the employer's service, have learnt the secrets of his business from doing work which may damage the goodwill of the employer. There is no other ground on which the decisions can be supported; no other reason than goodwill can be suggested. There must be injury to the goodwill.

There is no difference in principle between the restriction of the right to work of a man who has sold his goodwill and the restriction of the right of a man who has learnt the secrets of the goodwill. The principle is that fair dealing should be

(1) 14 Ch. D. 351.
(2) (1837) 6 Ad. & E. 438, 454.
(3) (1839) 5 M. & W. 548, 559, 563.
(4) (1853) 1 E. & B. 391.
(5) (1843) 11 M. & W. 653, 665.
(6) [1892] 3 Ch. 447.
(7) [1893] 1 Ch. 630; [1894] A. C. 535.
(8) [1896] 1 Q. B. 478, 482.
(9) [1899] 1 Ch. 300, 304, 308.
(10) [1899] 2 Ch. 13, 23, 29.
(11) [1907] 1 Ch. 322.
(12) [1909] 1 Ch. 763.
(13) [1913] A. C. 724.
(14) [1914] 1 Ch. 413.
(15) [1914] 1 Ch. 468.
(16) (1915) 31 Times L. R. 205.

encouraged. That this is so is shown by the cases which have been already cited. In each case the Court has to consider whether the limitations are greater than are reasonably necessary for the protection of the goodwill—i.e., of the business.

[JOYCE J. On a sale of a business the vendor must not derogate from his own grant.]

Yes. That is the point on which he is in a different position from a workman who has learnt secrets. The thing to be protected is in both cases the goodwill or business. The benefit of the covenant passes with the business: *Henry Leetham & Sons* v. *Johnstone-White.* (1) The reasonableness of the restrictions in the workman's case have to be considered with respect to the kind of work, the area of work, and the period for which he is restricted. Every case must depend upon its own particular facts. When the Court is satisfied that the limitations are reasonable for the protection of the business there is no other question to be answered. The interests of the covenantor are immaterial; though no doubt oppression and duress are grounds for attacking a covenant apart from restraint of trade. The Court would interfere with the execution of unconscionable bargains. Sargant J. has taken into consideration the hardship on the servant, but the true rule is that as soon as the Court is satisfied that the limitations are reasonable there is no scope for any further inquiry. The test is the reasonableness as between the covenantee and the public. For that purpose only can the interests of the covenantor be considered. The material date is the date when the contract was entered into; if the contract was valid then it cannot be invalid now, or change with circumstances. This covenant is not divisible; it must stand or fall as a whole, although in some cases covenants have been held to be severable: *Rogers* v. *Maddocks* (2); *Goldsoll* v. *Goldman.* (3)

In the present case we have in our favour a finding of fact by Sargant J. that this covenant was not greater than might reasonably be required for the protection of the employers. No doubt it is competent to this Court to review that finding, but

(1) [1907] 1 Ch. 322, 327. (2) [1892] 3 Ch. 346.
(3) [1915] 1 Ch. 292.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY.

we submit that it is right. The covenant is restricted to four kinds of machines; the appellants have offices in many large towns in England and Scotland and travellers in Ireland. It is to the advantage of the public that employers should be able to teach their trade secrets to their servants without danger of competition. Hardship on the covenantor has never been held to be a ground for relief. Such covenants are only taken from servants in higher grades who have opportunities of learning secrets. The covenant means that the covenantor is not to be connected with any business in which he can use knowledge acquired in the plaintiffs' service. It does not refer to different sorts of business.

Romer, K.C., and *W. R. Sheldon*, for the respondent. The decision appealed from is right. Even if the last part of the covenant is severed from the first part the covenant is invalid on the ground that it is too wide. An employer is entitled to take a covenant from his servant which will prevent him from disclosing trade secrets, and to a covenant to prevent him from making use of his customers. But he is not entitled to prevent a servant from using the knowledge to acquire which he entered into the service. He cannot say "I will teach you the business but I will prevent you from competing with me afterwards." Every servant who enters a business must learn the methods peculiar to the employer, and he cannot be restrained from carrying on business in the only way he understands. In this case no trade secrets are involved, nor any list of customers. The appellants' own evidence shows that there was nothing to justify so wide a covenant. The first case to which it is necessary to refer is *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), in which all the earlier cases were discussed, and it was held that the rule that the test to be applied to these cases was the question whether the covenant was wider than was necessary for the protection of the employer had been modified: per Lord Macnaghten. (2) The public have an interest in every person's carrying on his trade freely; and so has the individual. The whole basis of the doctrine is public policy. Covenants in restraint of trade are held to be void on

(1) [1893] 1 Ch. 630; [1894] A. C. 535. (2) [1894] A. C. 565.

that ground. There is also a public policy in favour of freedom of contract, but, generally speaking, freedom of trade was preferred to freedom of contract. Again there is another public policy which enables the Court to give effect to these covenants on the ground that employers ought to be encouraged to carry on and teach others their trade without fear of competition. In each case it is necessary to take into consideration all these policies. Lord Macnaghten points out (1) that there is a difference in this respect between covenants on a sale of a business and covenants by a servant. There is more freedom of contract between vendor and purchaser than between master and servant. The retirement of a young man from business injures the public more than that of an old man who wishes to give up work. Lord Macnaghten says (1) that in ascertaining whether the restriction is justified the Court must consider whether it is reasonable—"reasonable, that is, in reference to the interests of the parties"—not the party—"concerned and reasonable in reference to the interests of the public." Lord Herschell L.C. (2) agrees that the interests of the public must be considered. The same view was taken in the Court of Appeal. (3) The interests of the covenantor have always been taken into consideration. That was done for instance in *Mallan* v. *May*. (4) The principle is that any covenant which interferes with freedom of trade is contrary to public policy and the Court has to make an adjustment between the different policies. The interests of the individual are considered only because they affect public interests. The covenantee has to show that the restriction is reasonable, and the interests of the covenantor have to be considered in deciding that point: *Mason* v. *Provident Clothing and Supply Co.* (5); *Sir W. C. Leng & Co.* v. *Andrews*. (6) The only decision against our contention is that of Neville J. in *Henry Leetham & Sons* v. *Johnstone-White* (7), and that was reversed on appeal, though on different grounds. (8) The covenantor's liberty must

(1) [1894] A. C. 565, 566.
(2) Ibid. 549.
(3) [1893] 1 Ch. 630, 649, 668.
(4) 11 T. W. 653, 665.
(5) [1913] A. C. 724, 734.
(6) [1909] 1 Ch. 763, 768.
(7) [1907] 1 Ch. 189.
(8) [1907] 1 Ch. 322.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY

not be unnecessarily interfered with: *Haynes* v. *Doman* (1); *Eastes* v. *Russ.* (2)

The propositions put forward on behalf of the appellants are revolutionary. The public interest was the foundation of a great deal of the doctrine on this subject and is emphasized throughout *Mitchel* v. *Reynolds* (3), which also refers to the covenantor's interest and shows that that interest had been considered long previous to Lord Macnaghten's judgment in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (4) Public policy was also emphasized in *Homer* v. *Ashford* (5) and was discussed in *E. Underwood & Son* v. *Barker* (6), which is the only case in which such a universal covenant as was there entered into has been held good. *Leather Cloth Co.* v. *Lorsont* (7) was a vendor and purchaser case and was decided on the principle that a man cannot derogate from his own grant. To say that because the particular trade in this case is in few hands it is important that the respondent should not go elsewhere seems to ignore public policy and also the respondent's own interest. Take for instance the case of naval ordnance, and suppose that Armstrongs and Vickers had imposed a covenant of this sort, then in a national crisis like the present none of their workmen could go into a new or another business of that sort, and no one who set up a naval gun factory in this country could employ any of their men, and that certainly would be against the public interest. The same thing would apply with equal force to an aeroplane factory. It is not reasonable that a covenant of this sort should extend to the whole of the United Kingdom. The case of vendor and purchaser of goodwill is on a different footing. The public might suffer through a restraint on the vendor, but they ought not to be able to interfere to take away from him the fruits of his work. That is a case of balance of convenience and public policy has to yield.

Sir R. Finlay, K.C., in reply. The case of employer and employee is not different in principle from that of vendor and

(1) [1899] 2 Ch. 13, 19.
(2) [1914] 1 Ch. 468, 476, 489.
(3) (1711) 1 P. Wms. 181.
(4) [1894] A. C. 535.
(5) (1825) 3 Bing. 322.
(6) [1899] 1 Ch. 300.
(7) (1869) L. R. 9 Eq. 345.

purchaser. The protection of property is in each case the foundation of the principle. The danger of undue influence in the case of master and servant is the only ground for any distinction between the two, and that can be dealt with when it arises in each particular case; it should not be allowed to interfere with the doctrine upon which the whole principle rests. That is borne out by Lord Macnaghten in the *Nordenfelt Case.* (1)

In the face of the evidence in this case it is idle to suggest that a restraint upon the respondent from competing in these four classes of special articles cuts him out from the whole work of engineering, or is any hardship upon him by debarring him from earning a livelihood. In considering the question of the restraint upon the covenantor the Courts have always looked at the counterbalancing considerations or advantage, and where the restraint does no more than afford reasonable protection to the master they have enforced it, but where the restraint is greater than the reasonable protection of the master requires, then they have held that it is not enforceable. Freedom of trade has to be reconciled with the protection of the individual in each case. That appears from the judgment of Lord Herschell L.C. in the *Nordenfelt Case* (2); *Mallan* v. *May* (3); per Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (4); *Temple Press* v. *McNab* (5); per Romer L.J. in *Haynes* v. *Doman* (6); per Bowen L.J. in the *Nordenfelt Case* (7); and *Eastes* v. *Russ.* (8) The dictum of Farwell L.J. in *Sir W. C. Leng & Co.* v. *Andrews* (9), referred to by Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (4), was obiter and was too wide.

Cur. adv. vult.

March 31. LORD COZENS-HARDY M.R. This is an appeal from a judgment of Sargant J. dismissing with costs an action claiming an injunction against a servant for breach of a covenant in restraint of trade, the terms of which must hereafter be considered in detail.

(1) [1894] A. C. 535, 566, 567.
(2) Ibid. 548.
(3) 11 M. & W. 653.
(4) [1913] A. C. 724, 740, 741.
(5) Unreported.
(6) [1899] 2 Ch. 13, 29.
(7) [1893] 1 Ch. 630, 667, 668.
(8) [1914] 1 Ch. 468.
(9) [1909] 1 Ch. 763.

C. A.
1915
HERBERT MORRIS, LIMITED v. SAXELBY.
Lord Cozens-Hardy M.R.

The validity or invalidity of covenants in restraint of trade is not regulated by statute. It depends upon the common law, which is founded upon public policy. This varies from time to time. The judges have to interpret the phrase "public policy" according to the ideas current in this country at a particular date. There are at least two rival or opposite views which have to be weighed, and if possible to be reconciled. On the one hand, it is in the public interest that a covenant should be observed and enforced. On the other hand, it is in the public interest that a man should be free to use his skill and experience to the best advantage, and should not be put in the position of a slave. It has now been laid down by the highest authority that a covenant is not good if it imposes a greater restraint than is reasonably required for the protection of the covenantee, and that the answer to this question rests with the Court or judge and not with a jury. Whether the onus lies upon the covenantor to establish the invalidity, or upon the covenantee to establish its validity, has been doubted. I assume that it lies upon the covenantor. But I do not regard this as of any serious importance. The facts and the contract are before the Court, and it is very seldom that it is necessary to resort to the doctrine of onus in a case of this nature. This negative proposition, which I consider established, is a limit imposed upon what the covenantee can lawfully exact, but I do not assent to the argument so strongly pressed upon us as an affirmative proposition, that the only matter to be considered is the interest of the covenantee, and that he is only bound to satisfy the Court that the restraint is not greater than is reasonably required for his protection. In the *Nordenfelt Case* (1) Lord Macnaghten said: "It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities." It may be possible to reach the same conclusion

(1) [1894] A. C. 535, 565.

by holding that a covenant cannot be reasonable for the covenantee to exact if it is harsh and unreasonable towards the covenantor. I think regard must be had to the interest of the covenantor, and not solely to the interest of the covenantee.

Another proposition urged by the appellants was that there is no distinction to be drawn between covenants in a contract of service and covenants on a sale of goodwill. In my opinion, there is a great deal of authority against this proposition. It is sufficient to refer to what was said by Lord Macnaghten in the *Nordenfelt Case*. (1) The passage is too lengthy to quote in full. It must suffice to set out one sentence: "Different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other." Lord Haldane in *Mason* v. *Provident Clothing and Supply Co.* (2) pointedly refers to the distinction, and Lord Shaw in the same case used even stronger language (3): "In my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work." There are at least three classes which may require separate treatment: (1.) A trade secret may justly be protected by an absolute covenant, without limit as to time or space; (2.) the vendor of goodwill ought not to be allowed to derogate from his own grant, and a wide restriction may properly be given to protect the enjoyment by the purchaser of that which the vendor has sold; (3.) in a contract of service there is a less freedom of negotiation, and a far greater risk of oppression, and the Court ought to guard more carefully the interests of the covenantor. The whole law on this subject was so fully discussed and defined by the House of Lords in the *Nordenfelt Case* (4) that I do not think any advantage will be gained by referring to earlier authorities.

It remains to consider the facts of the present case. The plaintiff company are manufacturers of machinery, and they have

(1) [1894] A. C. 566, 567.
(2) [1913] A. C. 724, 731, 738.
(3) [1913] A. C. 738.
(4) [1894] A. C. 535.

C. A. 1915

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Cozens-Hardy M.R.

made a specialty in the sale or manufacture of heavy goods such as pulley blocks, hand overhead runways, electric overhead runways, and hand overhead travelling cranes. These articles are not protected by patent, nor is there any secret process relied upon. Their business is extensive; their head office is at Loughborough and they have offices in London, Manchester, Birmingham, Leeds, Sheffield, Newcastle, Cardiff and Glasgow. Their business is highly organized and well managed. The defendant, who was born in 1885, entered the plaintiffs' employment in February, 1901, as a junior draughtsman. Before he attained twenty-one he reached the position of leading draughtsman. Immediately after attaining twenty-one he was required to sign an agreement dated July 16, 1906, under which he was to receive a salary of 50*s.* per week, his engagement being for a term of not less than one year, and thereafter subject to four weeks' notice on either side. There was a restrictive covenant binding him for seven years from the date of his ceasing to be employed by the company, which was substantially in the terms of the covenant sued upon in this action. Such a covenant, exacted immediately after the defendant attained twenty-one, was, in my opinion, wholly unreasonable, having regard especially to the position he then occupied. In 1908 he went to the plaintiffs' branch at Cardiff as resident manager, and he remained there for nearly twelve months. In February, 1909, he went to the London branch and took part in selling. In 1910 he left London to take charge of the selling department at Loughborough in connection with pulley blocks and Admiralty contracts, and he continued there until he left the plaintiffs' service in April, 1913.

By an agreement dated March 7, 1911, he was to be employed by the company as an engineer at a salary of 3*l.* 17*s.* 6*d.* per week, the engagement being for a term of not less than two years, and thereafter subject to four weeks' notice on either side. By clause 6 "The employee shall not, during his employment nor at any time afterwards, divulge nor communicate to any person, corporation or firm, any information which he may receive or obtain in relation to the company's affairs and customers, and all instructions, drawings, notes and memoranda made by the employee, or which may come into his possession

while engaged as aforesaid, shall be the exclusive property of the company"; and by clause 7 "In consideration of the agreement hereinbefore contained, the employee covenants and agrees with the company, their successors and assigns, that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company, whether under this agreement or otherwise howsoever, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant or otherwise, alone or jointly, or in connection with any other person, firm or company, or be concerned or assist directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes, or any part thereof, or be concerned or assist as aforesaid in any business connected with such sale or manufacture."

The question for our decision is whether the plaintiffs are entitled to an injunction in terms of clause 7. Objection was taken to the words at the end of the clause following the word "cranes." Any difficulty in this respect is got rid of, because I think the clause is severable and the plaintiffs are willing to accept an injunction omitting the words in question. It remains to consider whether in this modified form the contract can be supported. It must not be forgotten that in March, 1911, the defendant was not really in the position of a free man, negotiating on equal terms with his employers. He was tied and bound by the covenant in the agreement of 1906 for seven years, and although in my opinion that covenant would have been held unreasonable, it none the less was a serious fetter upon his power of bargaining with his employers. Moreover, such a restrictive covenant is not usual in the engineering trade. Sargant J. has held that although the agreement may be of some advantage to the plaintiffs as restraining competition, it is not reasonable when viewed from the point of view of the defendant or of the public in general. I agree with his judgment on this point. The restriction, though not in terms lifelong, is, as the learned judge says, for the very considerable period of seven years, a period which is not practically distinguishable from the whole life, since during the whole of such period he would have

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY. Lord Cozens-Hardy M.R.

necessarily to earn his living in some other kind of business, and with little hope of returning to his original employment. The restriction, moreover, extends to the whole of the United Kingdom, and is in no way limited to soliciting customers of the plaintiffs' firm, nor is it limited to the capacity in which he may be employed by rival machinery makers. In the language of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (1), "Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?" At the date of the agreement he had been for ten years in the employment of the company. His whole training was in connection with the heavy goods in question. I cannot think it was reasonable to require him to put aside all the skill and experience acquired during those ten years and to begin life afresh. I should add that there is no proof, and I think there is not even a suggestion, that the defendant has been guilty of any breach of confidence, or that he has disclosed or threatened to disclose any secrets of the company.

In my opinion, Sargant J.'s judgment was correct, and the appeal should be dismissed with costs.

PHILLIMORE L.J. In this class of case there are three considerations which govern the decisions, and each consideration has at different times had its day, that is, it has had greater weight. First in the history of our law came the consideration of restraint of trade. Trade was to be free, and every and any restraint on it had to show its justification. Under the dominion of this consideration it mattered not whether a covenant in restraint of trade was made with reference to a sale or to the departure of an employee. If the covenant was for what was considered an adequate consideration, and was so limited in respect of work, space, and time as to afford no more than a reasonable protection to the business of purchaser or employer, or as to be a reasonable ancillary to the main contract, the special trade advantage was held to take the case out of the general

(1) [1913] A. C. 724, 742.

rule, and the covenant, though pro tanto in restraint of trade, might stand, otherwise not. This rule is to be found as late as *Mitchel* v. *Reynolds* (1) in 1711. Parker C.J., giving the resolution of the Court, said: "To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained." In that case the following passages occur: "It would be unreasonable to fix a certain loss on one side, without any benefit to the other"; and the converse: "The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void." But the time came when public policy began to lose its force—when Courts spoke of it as "an unruly horse," when political philosophy and political economy taught that the interference of the State should be reduced to a minimum, and that liberty was everything, liberty including absolute freedom of contract, that the world was to be regulated by contract, and the duty of the Courts was to impress on every one the sanctity of contract. Under the dominion of this second consideration the decisions in favour of these restrictive covenants reached their high water mark. The progress may be traced through many cases. In *Tallis* v. *Tallis* (2), in 1853, Lord Campbell C.J., delivering the judgment of the Court, said: "For many years the contract was void unless the consideration was adequate to the restriction. According to Parker C.J. in *Mitchel* v. *Reynolds* (1), the Court was to see that it was made upon a good and adequate consideration so as to be a proper and useful contract. But in *Hitchcock* v. *Coker* (3) it was held that the Court had no judicial perception of the ratio of the consideration to the restriction; and that, if there was a legal consideration of value, the contract ought to be enforced without reference to the quantum of that value. Also in *Mitchel* v. *Reynolds* (3) it is said: 'Wherever such contract stat

(1) 1 P. Wms. 181, 191, 197. (2) 1 E. & B. 391, 410.
(3) 6 Ad. & E. 438.

C. A. 1915 — HERBERT MORRIS, LIMITED v. SAXELBY. — Phillimore L.J.

indifferenter, and for aught appears, may be either good or bad, the law presumes it prima facie to be bad.' But, according to the tenor of the later decisions, the contract is valid unless some restriction is imposed beyond what the interest of the plaintiff requires; and his interest has been considered to extend very widely." This progress is commented on by all the judges in the Court of Appeal in the *Nordenfelt Case.* (1) There is a résumé of the history in Lord Macnaghten's judgment in the same case. Milestones marking the road are: *Homer* v. *Ashford* (2), in 1825; *Hitchcock* v. *Coker* (3), in 1837; *Mallan* v. *May* (4), in 1843; *Tallis* v. *Tallis* (5), in 1853; *Rousillon* v. *Rousillon* (6), in 1880; *E. Underwood & Son* v. *Barker* (7) and *Haynes* v. *Doman* (8), both in 1899. The last three cases I think represent the high water mark. In *Rousillon* v. *Rousillon* (6) Fry J. relied upon what Sir George Jessel M.R. said in *Printing and Numerical Registering Co.* v. *Sampson* (9): "Contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Under the dominion of the second consideration as under the dominion of the first, no distinction was drawn (as none could, as it appears to me, logically be drawn) between cases of sale and cases of service. But then the third consideration began to form part of the general environment in which we all move, and in time to influence the Courts—it may be called "regard to the weaker party as such" or the paternal consideration. When this third consideration began to acquire force, the Courts ceased to react as freely to the earlier stimuli. And simultaneously began the distinction between cases on sale of goodwill, where vendor and purchaser were deemed on an equal footing, and cases of employment where up till now (whatever may be the case in future years) the weaker party has been, or has been

(1) [1894] A. C. 535.
(2) 3 Bing. 322.
(3) 6 Ad. & E. 438.
(4) 11 M. & W. 653.
(5) 1 E. & B. 391.
(6) 14 Ch. D. 351.
(7) [1899] 1 Ch. 300.
(8) [1899] 2 Ch. 13.
(9) (1875) L. R. 19 Eq. 462, 465.

deemed to be, the employee. As far as I can find, this doctrine first emerges in Lord Macnaghten's judgment in the *Nordenfelt Case* (1), in a passage which I am about to quote: "To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment." It appears in *Sir W. C. Leng & Co.* v. *Andrews* (2), *Mason* v. *Provident Clothing and Supply Co.* (3), and *Eastes* v. *Russ.* (4) But all through the Courts have stuck to one test. It still remained as stated in *Mallan* v. *May* (5) by Parke B., delivering the judgment of the Court: "The test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." And Lord Macnaghten, with whom, as I have said, this third consideration first emerges in any distinct way, nevertheless says in the *Nordenfelt Case* (6): "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It

(1) [1894] A. C. 535, 566.
(2) [1909] 1 Ch. 763.
(3) [1913] A. C. 724.
(4) [1914] 1 Ch. 468.
(5) 11 M. & W. 653, 665.
(6) [1894] A. C. 535, 565.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY. Phillimore L.J.

is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." There is here no special reference to the position of the employee and no distinction such as follows in the next page of Lord Macnaghten's judgment between cases of sale and cases of service. Still with the later cases, since the *Nordenfelt Case* (1) there has entered in some subtle way into the discussion of the reasonableness of the covenant some explicit statement of regard or tenderness for the special position of the employee. Logically, however, it only comes to this, and this is what Lord Macnaghten says, that while in the cases of sale the very fact that two men of full years have entered into the covenant is some evidence that it is reasonable and such as has been fixed by the "higgling of the market," this piece of evidence disappears or is diminished when the covenant is between employee and employer. This may be what Sargant J. was thinking of when he said: "From the point of view of the employers alone I am not prepared to say that the agreement here is unreasonable as regards either space or time in the sense that it might not be some advantage to the plaintiffs to prevent the defendant from engaging in work of the kind prohibited to the full extent of the space and time prescribed"; then I omit some words. "And if the question were one, as in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), between a vendor and a purchaser, I should feel compelled to give effect to the contract. On the other hand from the point of view of the employee and the public it is of the very greatest importance to note"—and then he proceeds. But I doubt Sargant J.'s way of treating the question subjectively has its danger. It leads to your considering the effect upon the employee twice over. The law starts with considering the effect upon him, and every restriction on his liberty is pro tanto objectionable, not by reason of tenderness for his interests, but because it is against public policy to restrict any one. The

(1) [1894] A. C. 535.

covenant has to make its way against this objection, and only makes its way if it is shown to do no more than give reasonable protection to the employer. The test is still what is reasonable protection for the employer, as for the purchaser. In considering what is reasonable we may attach less weight to the fact that a bargain has been made as being evidence of the reasonableness of that bargain, when it is an employment case; and we may perhaps somewhat develop the language of Parker C.J. and say: It is not reasonable to impose a great and certain disadvantage upon the employee in order to secure a slight and contingent advantage to the employer. But that is all. In the case before us the area is wide, but it is not unlimited. A covenant is not necessarily too wide because it covers the United Kingdom. The defendant got apparently good employment in France and might have stayed there. No doubt Best C.J. in delivering the judgment of the Court in *Homer* v. *Ashford* (1) says: "Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in *the kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself." But to begin with, I think the words "any useful undertaking" as he uses them mean "every useful undertaking," and secondly, the observation was obiter, the decision being in favour of the covenant. The covenant in *Tallis* v. *Tallis* (2), though not quite so wide as to cover the United Kingdom, left very little territory of any importance uncovered. In *Rousillon* v. *Rousillon* (3) the covenant was unlimited as to space. In the *Nordenfelt Case* (4) the restriction was unlimited in space and it was upheld. In *E. Underwood & Son* v. *Barker* (5) a covenant which covered the whole United Kingdom and other countries besides was held not unreasonable in the circumstances, Lindley M.R. saying that he did not feel compelled by *Ward* v. *Byrne* (6) to hold the restraint unreasonable, and adding: "Time was when all agreements in restraint of trade or liberty to work were regarded as against

(1) 3 Bing. 322, 326.
(2) 1 E. & B. 391.
(3) 14 Ch. D. 351.
(4) [1894] A. C. 535.
(5) [1899] 1 Ch. 300, 304.
(6) 5 M. & W. 548.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY. Phillimore L.J.

public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad." *Goldsoll* v. *Goldman* (1) is very much in point on this question. There the covenant being for the United Kingdom and the Isle of Man, and also for France and other Continental countries, and the United States, was held too wide in its entirety, but severable and enforceable as to the United Kingdom and the Isle of Man.

As to subject-matter, the defendant is restricted only in respect of four special engineering processes. True they are those he has specialized in; but they are also those in which he could do his old employers most harm, and those in which he had previously to the covenant himself asserted his power of transferring business connection. The plaintiff company will, as I understand, be content with an enforcement of the covenant only so far as it binds the defendant not to carry on for seven years in the United Kingdom either as principal, agent, or servant, or otherwise alone or in connection with any other person, firm, or company, the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, and overhead travelling cranes, omitting the clause against being concerned or assisting directly or indirectly in the sale or manufacture, and the words prohibiting sale or manufacture of parts of the pulley blocks, &c., and the covenant can be so severed.

It has been contended by Mr. Sheldon that the danger of a monopoly of a few important articles such as those to which this covenant relates makes it against public policy to enforce the covenant. This might be so, but, if so, it would apply as well to sales of goodwill as to service contracts. If it were proved that there were so few firms and so few artificers that two or three firms combining to impose such a covenant upon their employees would prevent any establishment of a fresh factory, it

(1) [1915] 1 Ch. 292.

might be that such a covenant might be refused enforcement, but it would be so equally upon a sale of goodwill. This would be a case of the "pernicious monopoly" spoken of by Bowen L.J. in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt.* (1) The plaintiff company has not in one sense any trade secrets. It has no mysterious chemical or electrical knowledge. But it has highly organized methods of production which are all its own, and elaborate systems of calculation, with the result of long experience as to the proportionate strength of parts and articles necessary in their manufacture. Treating the defendant as a quasi-apprentice, the company has a right for a limited time, and over a limited area, to be protected against his competition: see *Hitchcock* v. *Coker* (2), a decision in the Exchequer Chamber, and my judgment in *Eastes* v. *Russ.* (3) He had also, I think, acquired considerable knowledge (as he himself says) of the more important customers of the firm. Time is more difficult. Seven years is a long time. But we must look at the covenant in respect of all the conditions and see how it then stands. After analysis we must recompose. A covenant which is large in one element may be supported if it is narrow in the others. Thus life was not too long in the case of a dentist, when the area was London, *Mallan* v. *May* (4), nor twenty-five miles round Dudley in *Haynes* v. *Doman.* (5) Unlimited space was not too wide in *Rousillon* v. *Rousillon* (6) and in the *Nordenfelt Case* (7), where the subject-matter was restricted. There is, as far as I know, no reported case where it has been attempted to restrain a man from every form of employment even for a brief time, and over a small area. But Best C.J. in *Homer* v. *Ashford* (8) seems to think even that might be if the area was less than the kingdom. In *Eastes* v. *Russ* (9) the defendant, a trained physician, was said to be by temperament unfitted for clinical practice. He had only his career as a microscopist. Even so, it required the extent in time to life and in space to Greater London, said to be

(1) [1893] 1 Ch. 630, 668.
(2) 6 Ad. & E. 438.
(3) [1914] 1 Ch. 468, 489.
(4) 11 M. & W. 653.
(5) [1899] 2 Ch. 13.
(6) 14 Ch. D. 351.
(7) [1894] A. C. 535.
(8) 3 Bing. 322.
(9) [1914] 1 Ch. 468.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY.

at the moment the only place in the United Kingdom where his peculiar work went on, to induce me to hold the covenant too wide. I do not think it is too wide in this case, and for my part I should allow the appeal and grant the modified relief with which the plaintiffs' counsel will be content.

JOYCE J. The first of the two clauses upon which this action is brought is a covenant not to communicate or divulge information as to the customers or affairs of the plaintiffs acquired by the defendant whilst in their employment; that is, it is a covenant against certain definite overt acts. The statement of claim, however, asked for an injunction not merely against such acts as were expressly mentioned in the first clause, but further against using such information acquired by the defendant, and so on, which would include, I suppose, making use even in the defendant's own mind, possibly unconsciously, without divulging any fact to another person. No such injunction as this against using information could or ought to be granted unless there were an express agreement in terms to that effect—that is, against using such information—which there is not here, even if such an injunction could then be granted. Kay L.J. in the case of *Lamb* v. *Evans* (1) refers to this, and I myself, rightly or wrongly, in the case of *Attorney-General* v. *Walthamstow Urban Council* (2) refused to grant such an injunction. This observation of what the plaintiffs by the statement of claim ask is not, I think, altogether immaterial, because, as will appear, in my opinion what the plaintiffs are seeking to do in this action is really to prevent the defendant, not from divulging or communicating confidential information, but from using the skill, experience, and knowledge that are his own in the service of any one else but the plaintiffs. However, inasmuch as no evidence, or even suggestion, is forthcoming of the defendant threatening or intending to violate this first covenant with respect to divulging information, the plaintiffs admitted that they could not claim this injunction against divulging or communicating, which so far as the form is concerned and if the words "or using" be omitted would probably not be objection-

(1) [1893] 1 Ch. 218, 236. (2) [1910] 1 Ch. 347.

able. The only injunction now claimed is founded upon clause 7 of the agreement, stopping before or after the words "or any part thereof," which particular words the plaintiffs are now, as I understand, quite willing to omit from the injunction they ask. If insisted upon they would probably invalidate the claim, inasmuch as the articles referred to involve various quite common things such as chains, &c., and other things which are quite common, and as to which no possible restriction could be necessary.

The injunction claimed is, briefly stated, to restrain the defendant for the period of seven years, commencing on April 19, 1913, the date of the defendant leaving the service of the plaintiffs, from being concerned or assisting as principal, agent, servant, or otherwise, in the sale or manufacture of pulley blocks and other things, all of which perhaps may be comprised under the compendious designation of pulley blocks and lifting machinery. Now the agreement—really a covenant—upon which the claim to this injunction rests is one which is in restraint of trade, and the question we have to consider is whether it is in the circumstances such an agreement as is allowable by law and the Court is bound to enforce by injunction. Speaking broadly, as a general rule the Court, in my opinion, is not bound to enforce by injunction any covenant or agreement that is plainly unreasonable or oppressive, or where the damage to the plaintiff from a breach of the agreement would be negligible or slight, and the consequences to the defendant of the injunction being granted would be ruinous or disastrous. In such cases the plaintiff may well be left to his remedy in damages. There are two distinct classes of cases in which stipulations of the character of those in question here are to be found, namely, (1.) when there is the sale of a business (with goodwill or something of that kind), and (2.) agreements between an employer and a workman or servant purporting to restrict the movements of the latter after he has left the employment. In my opinion, justifiable, I think, both upon principle and authority, other and different considerations may and generally do arise in cases of the latter class that are not present, or are unimportant, in the former. In the case of a sale of a business the parties concerned (both vendor and

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY. Joyce J.

purchaser) are probably not very unequally matched in intelligence, business capacity, or experience, and presumably with equal facilities for obtaining the advantage of such legal advice as may be necessary. And the vendor of a business ordinarily gets adequate consideration for what he sells, including any stipulation, however stringent, precluding him personally from future competition with the purchaser in the business of which he has sold the goodwill. Stipulations which impose restrictions upon the vendor, so far as necessary for the protection of the purchaser against the vendor in the complete enjoyment of what the purchaser has bought and paid for, are quite intelligible and ordinarily free from objection. Public policy does not invalidate or interfere with any one precluding himself by agreement from competing in business with particular persons or a particular person so far as may be necessary to enable him to obtain the best price for his own business when he chooses to sell it. Indeed, upon the sale of goodwill of a business without any express stipulation the vendor is by law subject to certain restrictions, for instance, in particular, from soliciting old customers: *Trego* v. *Hunt*. (1) But in cases that arise between an employer and a former servant or workman, where the employer seeks to restrict the servant in his future employment, the terms of the agreement require to be scrutinized. For it cannot be denied that public policy requires, as a general rule, that a man shall not deprive himself or the State of the benefit of his labour, skill, or talent, and at the present time the Court, I think (except in cases between vendor and purchaser), is bound to examine critically any agreement which purports to restrict the natural right of every one to practise his calling, whatever it may be, in order to obtain thereby subsistence for himself and to maintain those who may be dependent upon him. And I think it may be taken to be settled at the present day that in considering whether restrictive clauses in an agreement taken by an employer from a person entering his service are illegal or otherwise the Court will and must have regard to the circumstances, position, and rights, natural and legal, of the covenantor, or person employed, and not merely to what is called the protec-

(1) [1896] A. C. 7.

tion of the employer. Of course, an agreement or covenant purporting to restrict the covenantor in his trade in so far as it may extend beyond what could possibly be of any benefit or advantage whatsoever to the covenantee is inoperative or void. The covenantee would sustain no damage by the breach.

The defendant in the present case was born on July 12, 1885; he entered the service of the plaintiffs in February, 1901, at a few shillings a week as office boy in the drawing office, and he then became a draughtsman. On July 16, 1906, four days after he came of age, then earning 50*s.* a week, the plaintiffs required him—that was their own word; there is no suggestion that he had any advice upon the subject—to enter into a somewhat remarkable agreement of that date containing restrictive clauses. I need not go through this agreement; the Master of the Rolls has referred to it; but it is an employment at 50*s.* a week for one year as draughtsman, terminable, I think, at a week's notice after one year, and this restriction is imposed in clause 7: "In consideration of the agreement hereinbefore contained, the employee covenants and agrees with the company, their successors and assigns, that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on, either as principal, agent, servant or otherwise, alone or jointly, or in connection with any other person, company or firm, or be concerned, or assist directly or indirectly, whether for reward or otherwise, in" what I may refer to shortly as a similar business. The defendant's stipulated employment was that of leading draughtsman, but it appears that in March, 1908, which I observe is more than seven years ago, the period mentioned in the covenant, the defendant left the drawing office and was sent to Cardiff as "resident engineer," whatever that may mean; it does not appear very precisely, but the point is that the defendant, as I understand it, has not been engaged in the drawing office at any time since. Then in March, 1911, the agreement containing the clause now in question was entered into. The term of the employment there again was not more than two years, and the restriction was one for seven years. The particulars of the

C. A. 1915

HERBERT MORRIS, LIMITED v. SAXELBY.

Joyce J.

negotiation, if any, for such agreement are not in evidence, but it is obvious that at that time the defendant was under the fetter imposed upon him, as soon as he was of age, by the original agreement of July, 1906, and if he had not come into the new agreement, but left the service of the plaintiffs, he would have had to face the subsisting clause in the original agreement, whereby he was restricted for seven years.

Now it is contended that the plaintiffs are entitled to an injunction to restrain the defendant from entering into the service of any one carrying on this particular business mentioned for the period of seven years, because it is argued that this is necessary for the protection of the plaintiffs, it being strenuously asserted that the rule of law is settled, just as much as if it were enacted in an Act of Parliament, that in no case is a covenant in partial restraint of trade void unless it extends beyond what is necessary for the protection of the covenantee, whatever that may mean. This, it was said, is the simple test in every case, and that in point of law there is no difference between cases of vendor and purchaser and cases of employer and servant. I think there are distinct and manifest differences. In the case of vendor and purchaser there does not seem to be much difficulty in determining what is reasonably necessary for the protection of the purchaser in the case of the sale of a business. It is obvious, however, that in order to determine what is "necessary for the protection of the covenantee" or employer, if that be the true test in a case between employer and servant, one must know not only what are the interests of the employer that are to be protected, but also what the employer is entitled to be protected against. Now I have examined the evidence in order to ascertain exactly what it is against which the plaintiffs desire and claim to be protected. There is no secret process or manufacture in the works of the plaintiffs, and it does not appear to me that there has in fact been any such personal relation between the defendant and any customer of the plaintiffs—I gather that there were no regular customers other than perhaps the Admiralty, War Office, Government departments, and such corporations as dock companies and railway companies—as would in the case of such a trade as that of a tailor or a dairyman enable the defendant, by

personal influence or his acquaintance with individual customers, to divert business from the plaintiffs to some other firms. There is no danger or apprehension, I think, of anything of this kind in the present case. But the plaintiffs pride themselves generally upon modern and energetic methods of conducting business; in particular upon a system of sheets and cards, &c., &c., of which a detailed description is contained in the judgment of Sargant J. Mr. Morris claims this system of the plaintiffs, and I think their organization and methods of business generally, as being secrets of their trade. No doubt the actual sheets, cards, formulas and other documents involved are of a confidential character, and the private and exclusive property of the plaintiffs. Against their contents being disclosed the plaintiffs, not unreasonably, I think, have protected themselves by clause 6, of which it is not suggested that there has been any infraction, nor is there any reason to apprehend that there will be; and, indeed, it is admitted on all hands that no one could carry away in his head the contents of any of these documents, which themselves are safely guarded by being kept under lock and key. As to the other supposed secrets, I mean the system, organization, and general methods of business of the plaintiffs, it would be no violation of any contract or obligation to be implied from the past relations of the parties, or any breach of confidence on the part of the defendant, if he were to use his general knowledge of these. He could not divest himself of the experience he possesses. But the plaintiffs avowedly object, not only to the documents being divulged, of which there is no danger, but to any part of their business system being used by any one else or imitated in any manner. In the case of *Sir W. C. Leng & Co.* v. *Andrews* (1) Farwell L.J. says this: "But, having regard to the course of the argument before us, I desire to read a passage from the speech of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2), where he says: 'Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—

(1) [1909] 1 Ch. 763, 773. (2) [1894] A. C. 535, 565.

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY. Joyce J.

reasonable, that is, in reference to the interests of the parties concerned and reasonable in the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'" Then begin Farwell L.J.'s words: "The argument which has been addressed to us on behalf of the respondents does not bring the case within that doctrine. That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else—matters which depend to some extent on good faith. A good deal has been said about organization. The evidence is singularly scanty in regard to details upon the exact meaning of that word in the present case; but I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organization, such as the establishment of one department with a chief or head and grades of subordinates under him, the desirability of establishing local centres of information in various towns and villages round about Sheffield, and the like. To acquire the knowledge of the reasonable mode of general organization and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, &c., or any secret process or things of a nature which the man was not entitled to reveal." With that, if I may respectfully say so, I entirely agree. In fact, the former part of the

extract has been distinctly and expressly approved by Lord Shaw in the House of Lords.

Having regard to the career and employment of the defendant while with the plaintiffs, and to what has been called his specialization, it has not unnaturally been found extremely difficult, if not impossible, for him, after leaving the plaintiffs, to obtain employment in the United Kingdom of Great Britain or Ireland with any general engineering firms that have no connection with pulley blocks and lifting machinery. Consequently he had to leave the country and betake himself to France to get employment. Unless the covenant be necessary in order to protect the plaintiffs against something which they are entitled to be protected against, it is, in my opinion, oppressive, only operating as a fetter to compel the defendant to continue in the service of the plaintiffs as they wished him to do upon their own terms. That this should be the result is not, I think, either just or reasonable.

In truth, when one gets to the bottom of the matter the grievance, or supposed grievance, of the plaintiffs—what they want to be protected against—is the defendant's taking his skill and general knowledge, derived not merely from his employment with the plaintiffs but also from his own study and observation with his business qualifications and experience, into the service of any other firm that may possibly at some future time compete with the plaintiffs. Any such remote damage to the plaintiffs from such a result appears to me highly problematical, if not wholly imaginary. Any question of breach of confidence or diversion of custom by personal influence or other illegitimate means being out of the way, what else is there on the part of the defendant that the plaintiffs are reasonably entitled to be protected against? I do not know of anything.

Generally I agree with the judgment of Sargant J., bearing in mind that his observation about the extent of the covenant which was taken hold of by the appellants in this case is qualified by what follows immediately afterwards. I think the restriction sought to be imposed by clause 7 of this agreement for as long a period as seven years throughout the United Kingdom of Great Britain or Ireland is not in the circumstances reasonable in

C. A. 1915 HERBERT MORRIS, LIMITED v. SAXELBY.

reference to the respective interests of the parties, and would be prejudicial in reference to the interests of the public. In other words, I think that the order of the Court below ought to be affirmed.

Solicitors: *Ward, Perks & Terry; Pettiver & Pearkes.*

R. M.

JOYCE J. 1915 *Jan.* 27, 28; *April* 16.

In re AINSWORTH. FINCH *v.* SMITH.

[1914 A. 912.]

Administration—Bequest to Special Trustees of Legacy settled on Persons in Succession—Different Rates of Duty—Legacy Duty on Life Interest—Duty wrongly paid out of Capital of Legacy by Executors beneficially entitled—Recoupment by Tenant for Life.

The executors of a will wrongly paid the legacy duty payable in respect of the life interest in a settled legacy, bequeathed to special trustees, out of the capital of the settled legacy which, subject to the life interest, was to fall into residue and be held in trust for the testator's widow for life and after her death for his brother absolutely. The widow and brother were two of the executors, the remaining executor being also one of the special trustees, both of whom were solicitors. In accordance with the provisions of the Legacy Duty Act, 1796, the duty payable in respect of the life interest should have been retained and paid by the special trustees in equal yearly instalments out of the income during the first four years of the life tenancy.

The amount of the settled legacy less settlement estate duty and legacy duty was paid to the special trustees, and after the lapse of seven years the special trustee who made the wrong payment of duty sought to make the tenant for life recoup out of the income of the settled legacy the legacy duty so paid out of capital:—

Held, that the error must be rectified, and that what had been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income.

In re Horne [1905] 1 Ch. 76 commented upon.

ADJOURNED SUMMONS.

The testator, who died in February, 1906, appointed his wife Margaret, his brother John Stirling Ainsworth, and the plaintiff Finch executors and general trustees of his will, and bequeathed a sum of 20,000*l.* to special trustees (the plaintiff Finch and a

Mr. Hawes) upon trust for the defendant Maud Smith during her life or so long as she remained unmarried, and in case she married then from and after her marriage as to the sum of 7000*l.* in trust to pay her the income thereof for the residue of her life and transfer the residue of the said sum of 20,000*l* or the investments thereof to the trustees of the will so that the same should sink into his residuary estate and after the death of Maud Smith to hold the sum of 5000*l.* (part of the settled legacy) in trust for her testamentary appointees, and the testator directed that the residue of the settled legacy and also the sum of 5000*l.* in default of appointment by Maud Smith should be transferred by the special trustees to the trustees for the time being of his will so that the same should sink into his residuary estate. The testator gave his residuary estate upon trust for his widow for life and after her death, in the event which happened, to the testator's brother the above mentioned executor John Stirling Ainsworth.

Maud Smith was a stranger in blood, and consequently the duty in respect of the legacy was payable under ss. 8, 12, and 13 of the Legacy Duty Act, 1796, as to her limited interest by equal portions out of her annual income during the first four years from her beginning to receive the same.

Mr. Finch was a solicitor, and he or his firm acted as solicitors to the testator's estate. Mr. Hawes also was a solicitor.

The executors paid the settlement estate duty of 154*l.* 0*s.* 4*d.* out of the settled legacy, and they also, and not the special trustees, paid the legacy duty payable in respect of Miss Smith's limited interest and amounting to 843*l.* 2*s.* 10*d.* (being 885*l.* 16*s.* 1*d.* less a discount of 42*l.* 13*s.* 3*d.*) out of the capital of the settled legacy and not out of her yearly income as provided by the Legacy Duty Act. The legacy duty account before payment of the duty was submitted to Mr. Hawes, who apparently approved the same, and on February 21, 1907, he signed a receipt for the settled legacy of 20,000*l.* less a sum of 997*l.* 3*s.* 2*d.* in respect of the settlement estate and legacy duties paid out of the capital. The sum so received was invested and the whole income arising therefrom was thenceforth received by Miss Smith.

JOYCE J.
1915
AINSWORTH, *In re.* FINCH *v.* SMITH.

Upon the discovery of the mistake this summons was taken out by the plaintiff Finch as special trustee of the trust legacy asking for a declaration that, in order to recoup to the capital of the trust legacy the sum of 843*l.* 2*s.* 10*d.* which was paid thereout for legacy duty as above mentioned, a like sum ought to be retained by the special trustees of the legacy out of the income payable to Maud Smith.

The defendants to the summons were Maud Smith, Mr. Hawes, Margaret Ainsworth the widow, and J. S. Ainsworth.

Hughes, K.C., and *F. R. Finch*, for the plaintiff. There has clearly been a mistake and there is no reason why it should not be put right. It does not matter whether the executors paid on their own account or on behalf of the special trustees. The amount paid out of capital ought to have been deducted out of income. This is an ordinary case of mistake made in administration. The legatee has been paid more income than she ought to have been paid, and there is no difficulty in now putting matters right: Lewin's Law of Trusts, 12th ed. ch. 14, s. 6, § 29, p. 413; *Livesey* v. *Livesey* (1); *Dibbs* v. *Goren* (2); *Harris* v. *Harris* (No. 2). (3) *Ballard* v. *Marsden* (4) is an exception to the general rule. *In re Horne* (5) does not assist the other side; it was a very special case, and the trustee was a beneficiary.

Wilfrid Hunt, for Mr. Hawes. Any hardship upon the legatee can be obviated by her releasing her power of appointment to the extent of the sum required. Thus, instead of taking it out of her income, the 5000*l.* can be reduced at her death by the amount.

W. R. Sheldon, for the residuary legatees. The matter ought to be adjusted. The principle—that if a mistake by overpayment or wrong payment has been made by trustees, and the matter is in the hands or within the jurisdiction of the Court, or the Court has the parties before it, the mistake can be remedied—is undoubted: *Dibbs* v. *Goren* (2); *Hood* v. *Clapham* (6); *Harris*

(1) (1827) 3 Russ. 287.
(2) (1849) 11 Beav. 483.
(3) (1861) 29 Beav. 110.
(4) (1880) 14 Ch. D. 374.
(5) [1905] 1 Ch. 76.
(6) (1854) 19 Beav. 90.

v. *Harris* (No. 2). (1) Cases where it cannot be done are where the claim is really a common law claim for money had and received and paid under a mistake of fact, where the claim is barred by the Statute of Limitations: *In re Robinson.* (2) There is no suggestion of misconduct. The Court can and will adjust the equities.

Tomlin, K.C., and *C. A. Bennett*, for the defendant Maud Smith. In the circumstances the claim cannot be sustained. The residuary legatees are really the only persons concerned in getting the money back. It is framed as a trustee's claim because otherwise the beneficiaries could have no claim. The executors had no right to pay the duty out of corpus, they ought to have taken it from income. The sum which the special trustees received was not what they were entitled to, it was 843*l.* less. This was one of the cases in which the executors were not entitled to pay the duty. As between them and the special trustees there is a settled account.

Money paid under a mistake of law cannot be recovered either at law or in equity. But there is this limitation in equity—that, where the Court is administering a fund and finds that a wrong payment has been made as between the beneficiaries, in such case the mistake of law does not take away the jurisdiction to give relief: *Rogers* v. *Ingham.* (3) The matter cannot be adjusted in administering the trusts of the legacy because the mistake was made by another set of persons altogether before the money came into the hands of the special trustees at all: *Bate* v. *Hooper.* (4) Nor could it be adjusted if this were now an action for administering the estate, because the legacy has been paid away and all the estate has been administered. The mere fact that a mistake has been made is not sufficient: *Harris* v. *Harris* (No. 2). (1) The law is nowhere more clearly stated than in *In re Horne.* (5)

The people who are claiming the money are the people who made the mistake.

This was a settled legacy in respect of which different rates

(1) 29 Beav. 110.
(2) [1911] 1 Ch. 502.
(3) (1876) 3 Ch. D. 351.
(4) (1855) 5 D. M. & G. 338.
(5) [1905] 1 Ch. 76.

JOYCE J. 1915 AINSWORTH, *In re.* FINCH *v.* SMITH.

of duty were payable, and fell within the provisions of ss. 12 and 13 of the Legacy Duty Act, 1796, under which the executors were under no liability to pay duty on this 20,000*l.* when they raised it. The duty payable in respect of Miss Smith's limited interest should have been paid by four yearly instalments out of her income and deducted thereout by the special trustees of the legacy, and until the first instalment of her income was in their hands no duty became payable. The executors were under no liability to pay the duty at all and had no right to do what they did. No duty had then become payable, and they were wholly wrong in paying the duty in one lump sum out of capital. When once this legacy had been raised and appropriated the executors ceased to hold it as executors and became trustees of it. The legacy ceased to form part of the testator's estate for all purposes, and the executors, whether it remained in their hands as trustees or was paid over to the special trustees, no longer had, and have not now, any claim against it for indemnity. There was an absolute payment of the legacy for all purposes and there remained no right of cross indemnity: *In re Smith* (1); *Ballard* v. *Marsden* (2); *Fraser* v. *Murdoch* (3); *In re Richardson.* (4)

There can be no question of impounding Miss Smith's interest here. Impounding is for something wrongly done in the execution of a trust, but nothing wrong has been done in the execution of this trust because what wrong there was was done by other parties who were constituting the trust. The special trustees have always acted strictly, and so there is nothing in this case upon which to found an application of the doctrine of impounding.

However the case is put, whether as a claim against an executor who paid away something which he ought not to have paid, or against the special trustee because he did not receive all he ought to have received, or against him for negligence as solicitor, the claim is statute-barred and the testator's widow and brother can have no claim against the plaintiff Finch. He cannot get it back on his own application. The result is that there is no liability against which he is entitled to be indemnified.

(1) (1889) 42 Ch. D. 302.
(2) 14 Ch. D. 374.
(3) (1881) 6 App. Cas. 855.
(4) [1896] 1 Ch. 512.

The decision in *In re Horne* (1) precludes these particular beneficiaries, the widow and brother of the testator, from recovering or succeeding. They have themselves been party to the mistake and are not entitled to recover their money back after the lapse of all these years.

Hughes, K.C., in reply. *In re Horne* (1) is the only case cited in support of the proposition put forward on behalf of Miss Smith, but is not applicable here where only two of the three executors are beneficiaries. There was no mistake of either law or fact in that case.

Cur. adv. vult.

April 16. JOYCE J. The testator, David Ainsworth, died on February 21, 1906. His executors and the general trustees of the will were his widow, Margaret, his brother John Stirling Ainsworth, and Mr. Finch, solicitor, he or his firm being the solicitors to the estate as I believe they had been to the testator himself.

By the will there was a bequest of 20,000*l.* upon trust to pay the income to Miss Maud Smith during her life or so long as she remained unmarried, and in case she married then from and after her marriage as to the sum of 7000*l.* in trust to pay the income to the same lady for the residue of her life and transfer the residue of the said sum of 20,000*l.* or the investments thereof to the trustees of the will so that the same should sink into his residuary estate and after the death of Miss Smith to hold the sum of 5000*l.* (part of the settled legacy) in trust for such person and in such manner as Miss Smith should by will or codicil appoint. Then the testator directed that the residue of the aforesaid trust funds and also the sum of 5000*l.* in default of appointment by Maud Smith should be transferred by the special trustees to the trustees for the time being of his will so that the same should sink into his residuary estate. The residue was given upon trust for the widow for life, and after her death, in the event which happened, to the testator's brother before named, that is to say John Stirling Ainsworth.

Miss Smith the legatee being a stranger in blood, this legacy

(1) [1905] 1 Ch. 76.

JOYCE J. 1915 AINSWORTH, *In re.* FINCH *v.* SMITH.

of 20,000*l.* was a legacy settled on successive persons who were liable to pay duty at different rates. In such a case the legacy duty is levied according to the provision of the 12th section of the Act of 1796, which is to be found at p. 496 of Hanson's Death Duties, 6th ed. In that case the provision is this: "Where any legacy or residue, or part of residue, shall be given to, or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce." I think I am right in saying that "the aforesaid term of four years" if it is not so in terms is in effect the term of four years provided for the payment of an annuity in, I think, an earlier section, but it is as stated in the text at p. 35 of Hanson's Death Duties.

In the present case the executors and general trustees, as I understand, paid, and rightly paid, out of the 20,000*l.* legacy the sum of 154*l.* for settlement estate duty. In strictness, the special trustees were, in the circumstances, the proper persons to account for and pay the legacy duty; but in fact the legacy duty account was forwarded to the Inland Revenue authorities by Mr. Finch, or, to be quite accurate, by his firm, acting in what capacity precisely does not, I think, appear, and they settled that account for the sum of 843*l.* 2*s.* 10*d.*, the amount of the capital sum chargeable for legacy duty against the life interest of Miss Smith less a discount of 42*l.* 13*s.* 3*d.* That sum was paid out of the residue of the 20,000*l.*, although such duty should, properly speaking, have been discharged by four yearly payments deducted from the annual income of the trust legacy.

The legacy duty account, however, before payment of the duty, and also subsequently the receipt for the payment, were submitted to Mr. Hawes, himself a solicitor, who was the co-trustee with Mr. Finch, Mr. Finch and Mr. Hawes being the special trustees of the legacy. Here I refer to a letter which was read to me of December 28, 1906, from Mr. Finch's firm to Mr. Hawes suggesting that he should return that account with any observations he might have to make, and also I refer to the receipt signed by Mr. Hawes on February 21, 1907, for the legacy of 20,000*l.* less a sum of 997*l.* 3*s.* 2*d.* legacy and settlement estate duty paid in respect thereof. The payment of the duty in the manner in which it was paid must, therefore, I think, be taken to have been approved by Mr. Hawes, although perhaps inadvertently, as well as by Mr. Finch, his co-trustee. It was stated, and some of the documents suggest, that Mr. Hawes was considered as in some way acting for Miss Smith, the tenant for life of the legacy, or as protecting her interest, but that he or she considered him as doing so was not, I think, made out.

Upon the documents and correspondence, I consider that Mr. Hawes—I do not impute any blame to him in the matter—as well as Mr. Finch, the two special trustees, in fact, if unadvisedly, concurred in the payment of the duties in the manner in which they were in fact paid. To my mind, it makes no material difference in the circumstances that actual payment to the Inland Revenue was made by the three executors, if it was so made, instead of the whole 20,000*l.*, or 20,000*l.* less settlement estate duty, being paid to the special trustees, and the 843*l.* 2*s.* 10*d.* subsequently paid by them.

Some time afterwards the error that had been made was discovered. Miss Smith, instead of having had the legacy duty upon her life interest deducted by four annual payments from the income of the legacy, has from the first had her income reduced by the amount only of the income or interest that would have arisen from the 843*l.* 2*s.* 10*d.* if and when invested, and upon her decease the corpus of the legacy, in part subject to her power of appointment over 5000*l.*, will, unless that error be rectified, be less than it ought to be by the last mentioned sum of 843*l.* 2*s.* 10*d.* or the investments thereof.

JOYCE J. 1915 AINSWORTH, *In re.* FINCH *v.* SMITH.

Now I think it might have been expected that a reasonable and right-minded person in the position of Miss Smith would have assented to the error being rectified, especially as the parties interested were willing, and still offer, whatever the further sum may be which upon a proper adjustment ought to be charged against the income of Miss Smith, that this be discharged by four annual payments or deductions from her future income. And, curiously enough, Miss Smith asserts that she herself originally desired the legacy duty to be discharged by instalments out of her income and appears to make it a grievance that the duty was not so paid. For some reason or other, however, the proposal to rectify the error that was made apparently bona fide and by inadvertence is now most strenuously resisted on the part of Miss Smith. It did not occur to me that she had any sufficient ground of objection, but the argument raised on her behalf, and, indeed, the only argument, as I understand, insisted upon before me, is that because of the three executors two, namely, the widow and Mr. John Stirling Ainsworth, were the persons entitled in remainder to a portion of the legacy after the decease of Miss Smith subject to the exercise by Miss Smith of her power of appointment over the 5000*l.*, and so are personally interested in having the matter set right, this cannot be done, inasmuch as the money was actually paid by the executors (although with the concurrence of Mr. Hawes) and not by the special trustees of the legacy after having had the full amount less settlement estate duty handed over to them by the executors. Therefore it was contended that neither the executors nor the special trustees of the legacy can have the relief which, as it appears to me, and as I understood counsel for Miss Smith not to deny, would have been granted almost as a matter of course if the testator's widow and brother, two of such executors, had not had any beneficial interest in the corpus of the legacy.

The only authority relied upon in support of this contention was the decision of Warrington J. as reported in the case of *In re Horne* (1), and which is said to have established for the first time some general rule that prevents the error being set right in

(1) [1905] 1 Ch. 76.

such circumstances as those of the present case. I am unable to accept this argument. Moreover, in these days innocent trustees acting bona fide are not treated with the severity of former days; and the case of *In re Horne* (1) was a totally different one from the present. There I should most probably have arrived at the same conclusion as Warrington J. did; but his judgment, I think, goes beyond anything required for the purposes of the decision. The present case appears to me to be distinguishable in many and most material respects. It is well settled, in the words of Rigby L.J., in the case of *Oliver* v. *Hinton* (2), that the Court is not bound to treat the mere language used by a learned judge in the particular case with which he was dealing as laying down a principle of law governing other cases; and Lord Halsbury said in the House of Lords in *Quinn* v. *Leathem* (3): "Now, before discussing the case of *Allen* v. *Flood* (4) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." At present, although I do not quarrel with the decision in the case of *In re Horne* (1), I am unable to accept the whole of the reasoning by which it was arrived at as applying generally to the cases in which such an error has been made as in the present instance. Besides, I am disposed to think, and indeed I do think, that the present case ought, in the circumstances, to be treated in the same way as it would have been if the legacy duty in question had been actually

(1) [1905] 1 Ch. 76.
(2) [1899] 2 Ch. 264, 276.
(3) [1901] A. C. 495, 506.
(4) [1898] A. C. 1.

JOYCE J. 1915 AINSWORTH, *In re.* FINCH *v.* SMITH.

paid by Mr. Finch and Mr. Hawes, the special trustees of the legacy, themselves. Mr. Hawes, as I understand, so far as he can properly adopt that attitude—Miss Smith being separately represented—raises no objection to the matter being put right, and, indeed, desires that it should be.

I hold, therefore, that the error which has been made must be rectified, what Miss Smith has been overpaid, upon all proper adjustments being made, being retained out of future payments of her income. It is not necessary to direct an inquiry.

Solicitors: *Rawle, Johnstone & Co., for Finch; Johnson & Co., Preston; Leighton & Savory; Baker, Blaker & Hawes.*

R. M.

YOUNGER J. 1915 *April* 16, 23.

In re GOSWELL'S TRUSTS.

[1915 G. 306.]

Conversion—Deed of Family Arrangement—Conveyance of Freeholds to Trustees—Trust to sell upon Request in Writing of Settlors—Trust of Rents and Profits until Sale for Settlors, their Heirs, Executors, Administrators and Assigns—Death of one of Settlors intestate—No Request to sell in Lifetime—Freeholds, whether converted into Money.

By a deed of family arrangement dated in 1910, and made between A. G. of the first part, H. G. of the second part, W. E. G. of the third part, and the said H. G., W. E. G. and B. W. as trustees of the fourth part, the parties thereto of the first, second, and third parts, for the purpose of settling certain questions which had arisen, conveyed and assigned certain freehold and leasehold hereditaments to the trustees, and it was thereby provided that the trustees should, "upon the request in writing of the parties hereto of the first, second and third parts respectively," sell the freehold and leasehold hereditaments and premises respectively thereby conveyed and assigned and should stand possessed of the residue of the moneys to arise from such sale after payment of costs, and also of the rents and profits of the said hereditaments and premises or such part thereof as should not be sold, and until the sale thereof in trust for the parties thereto of the first, second, and third parts respectively, their heirs, executors, administrators and assigns, in equal shares as tenants in common. In 1914 H. G. died intestate. Some of the properties had been sold in his lifetime, but no request had been made to the trustees to sell the properties remaining unsold at his death:—

Held, that the real estate comprised in the deed and remaining unsold

retained its character of real estate and had not been converted in equity into money.

Huskisson v. *Lefevre* (1858) 26 Beav. 157; *Sykes* v. *Sheard* (1863) 33 Beav. 114; *Thornton* v. *Hawley* (1804) 10 Ves. 129; *Attorney-General* v. *Dodd* [1894] 2 Q. B. 150; *In re O'Grady's Settlement* [1915] 1 Ch. 39; and *In re Taylor's Settlement* (1852) 9 Hare, 596, considered.

ADJOURNED SUMMONS.

This was an application by Henry Francis Goswell, an infant by his next friend, for the determination of the question whether the freehold messuages, lands, and hereditaments comprised in and sought to be dealt with by a deed of family arrangement dated April 12, 1910, and made between Annie Goswell of the first part, Henry Goswell of the second part, William Ernest Goswell of the third part, and the said H. Goswell and W. E. Goswell and Bowker Weldon of the fourth part, had been converted in equity into money, and in the event of that question being answered in the negative for the appointment by the Court of Settled Land Act trustees or alternatively for the appointment of persons to act on behalf of the infant under s. 60 of the Settled Land Act, 1882.

The circumstances attending the execution of the deed as appeared from its recitals were that the three conveying parties, Miss Annie Goswell and her two brothers Henry Goswell and William Ernest Goswell, were under certain wills and intestacies between them originally entitled for an absolute interest, but in proportions which it was difficult to ascertain, to certain separate parcels of freehold and leasehold hereditaments, some of which had been sold and some of which remained unsold, and that Miss Goswell and her two brothers being desirous of settling all the questions and doubts which had arisen with regard to their respective interests in these properties and in the proceeds of sale had agreed that the whole should belong to and be held in trust for them in equal shares as tenants in common. Accordingly the unsold properties in question were amongst other premises granted and conveyed to three trustees, two of whom were Henry Goswell and William Ernest Goswell themselves, to be held by them in fee simple upon the trusts and with and subject to the powers and provisions in the deed declared and contained concerning them. Clause 3

YOUNGER J. 1915 GOSWELL'S TRUSTS, *In re.*

of the deed, upon which the question turned, was in the following terms : " The trustees shall upon the request in writing of the said parties hereto of the first second and third parts respectively sell the said freehold and leasehold hereditaments and premises respectively hereby conveyed and assigned and shall receive all the moneys to arise from the sale of the said hereditaments and premises and shall with and out of the said moneys in the first place pay and retain the costs and expenses attending such sale and shall stand possessed of the residue of the said moneys and also of the rents and profits of the said hereditaments and premises or such part thereof as shall not be sold and until the sale thereof In trust for the said parties hereto of the first second and third parts respectively their heirs executors administrators and assigns in equal shares as tenants in common And it is hereby agreed and declared between and by the said parties hereto of the first second and third parts respectively that all and singular the moneys stocks shares securities and investments specified in the first schedule hereto and standing or being invested in the names of the said parties hereto of the said first second and third parts respectively notwithstanding in whosesoever name or names they shall stand or be invested shall belong to and be held in trust for the said parties hereto of the first second and third parts respectively their executors administrators and assigns in equal shares as tenants in common."

On April 24, 1914, Henry Goswell died intestate, leaving him surviving his widow, Alice Elizabeth Goswell, and two infant children, the applicant H. F. Goswell, who was born on September 24, 1898, and Alfred William Goswell, who was born on March 9, 1900.

On September 17, 1914, letters of administration to H. Goswell's personal estate were granted to his widow.

Some of the properties had been sold in the lifetime of H. Goswell, but no request had been made to the trustees to sell the properties remaining unsold prior to his death.

A. Roscoe, for the applicant. It is submitted that there has been no conversion in this case: *In re Taylor's Settlement.* (1)

(1) 9 Hare, 596.

The deed contains no trust for sale except upon the request of three named persons, and that trust came to an end on the death of the first one of them. *Thornton* v. *Hawley* (1) throws some light on the way in which the Court will regard cases of this kind. The question there was whether money had been converted into land and it was held that there had been conversion because the subsequent limitations of the property were such as were only applicable to real estate. In the present case the use of the word "heirs" in the subsequent trust supports the view that there has been no conversion, for if an immediate conversion had been intended the heirs could have taken nothing.

Cyril Hartree, for the respondents Annie Goswell, W. E. Goswell, Alice E. Goswell, A. W. Goswell, and the trustees of the deed. Clause 3 of the deed, it is submitted, confers upon the trustees not a mere power of sale, but an immediate and continuing trust for sale, and that notwithstanding the provision as to the sale being made upon the request in writing of the settlors. The result of the deed therefore was to effect an immediate conversion of the real estate into personalty. In *In re Taylor's Settlement* (2) the trust was to convey the real estate unless sold, which was inconsistent with there being an effective trust for conversion. [He also referred to *Davies* v. *Goodhew* (3); *In re O'Grady's Settlement* (4); *Sykes* v. *Sheard* (5); *Huskisson* v. *Lefevre.* (6)]

A. Roscoe in reply.

Cur. adv. vult.

April 23. YOUNGER J. read the following judgment:—The main purpose of this summons is to obtain the appointment of persons to act on behalf of the infant applicant under s. 60 of the Settled Land Act, 1882, in relation to certain messuages, lands, and hereditaments which are subject to the trusts of a deed of family arrangement dated April 12, 1910. But before the application can be entertained at all it is necessary to determine as a preliminary matter whether the interest of the

(1) 10 Ves. 129.
(2) 9 Hare, 596.
(3) (1834) 6 Sim. 585.
(4) [1915] 1 Ch. 39.
(5) 33 Beav. 114.
(6) 26 Beav. 157.

YOUNGER J. 1915 GOSWELL'S TRUSTS, *In re.*

infant in the property is in fact an interest in real estate inasmuch as it is contended that the effect of the deed was upon its execution definitely to attach to that property the quality of personal estate to which of course the provisions of the Settled Land Act would have no application, while the interest of the applicant therein would be materially less. [His Lordship stated the circumstances attending the execution of the deed as above set out and read clause 3. He continued:] Now it has to be noted on that clause, first, that the trust for sale is exercisable on the request of the three grantors in writing; that the request in terms is personal to them; that apart from that request there is no express trust for sale at all; and that the rents and profits of the real estate until sale are to or may devolve on the heirs of the grantors. Further it is to be noted with regard to the latter part of the clause dealing with property then in fact personal estate, that it is assumed that will devolve upon the executors and administrators and not upon the heirs.

Now Henry Goswell has died intestate. No request in writing or at all has been made to the trustees to sell the properties still unsold or any of them. The infant applicant is the elder son of Henry Goswell and his heir-at-law. Letters of administration to his personal estate have been granted to his widow.

In these circumstances on behalf of the widow and Henry Goswell's younger son it is contended that with regard to the real estate comprised in it, the true result of the deed was to effect an immediate conversion by conferring upon the trustees a present and continuing trust for sale with which the grantors were not entitled to interfere except in the sense that if they in writing requested a sale it would immediately become the duty of the trustees to effect one. And it was further said, so strong is the presumption that a sale upon request is in a deed such as this to have no further force and effect than that above stated, that it was incumbent upon those who sought to treat the request as a condition necessary to the exercise of the trust to point to some other relevant provision of the deed clearly showing that such was the intention of the parties to it.

Now several cases in support of this view were cited, and since the argument I have taken the opportunity of examining others, and in the result I have arrived at the conclusion that the contention so far as it depends upon authority is not well founded. To begin with, it seems to be reasonably clear that a trust for sale with a direction that it shall not be exercised unless a particular person shall in writing consent is not an absolute and imperative trust to sell, but gives to the person required to consent a right to have the property retained unsold: see *Huskisson* v. *Lefevre*. (1) Indeed, in the case of *Sykes* v. *Sheard* (2), a decision which derives additional authority from the fact, as is stated in the report, that it was affirmed by the Lords Justices where the will provided that a sale was to be made by the trustees with the consent in writing of the seven sons and daughters of a testator, the life tenants in undivided shares of the entirety, it was held that the trust was not one to be exercised by the trustees as they should think fit, but was a trust only to sell with the consent in writing of all the seven sons and daughters, and that accordingly it could not be effectively exercised even with the consent of the six survivors of the seven tenants for life and of the persons representing the entirety of the interest in the share of the seventh who had died. It is true that these cases deal with sales with consent as distinct from sales on request, but that distinction does not seem to be nor has it ever been regarded as material, and they do appear to indicate that there is no conveyancing reason why a provision akin to that contained in the present deed shall not under normal circumstances have the fullest effect given to it consistently with the natural meaning of the words employed.

Great reliance was however placed upon the case of *Thornton* v. *Hawley* (3), in which 10,000*l*. Bank Annuities were transferred to the trustees of a marriage settlement upon trust that they should with all convenient speed after request to them for that purpose made by the husband and the wife or the survivor of them or the executors or administrators of such survivor realize the annuities and with the like consent and approbation purchase

(1) 26 Beav. 157. (2) 33 Beav. 114.
(3) 10 Ves. 129.

YOUNGER J. 1915 GOSWELL'S TRUSTS, *In re.*

lands in fee simple. All the trusts of the settlement were applicable to real estate, and it was held by Sir William Grant upon the true construction of that deed that the intention was not that the purchase should never be made unless the request was given, but that the trustees were not to be guilty of laches in failing to make the purchase unless after the request was made they refrained from doing so, and he expressed the view that there was nothing in the deed to debar the trustees from laying out the money in land even if no request were made to them for that purpose at all. But when the judgment is carefully examined it becomes clear that Sir William Grant, so far from thinking that his conclusion was in accord with the ordinary meaning of the words employed, found it necessary to seek for indications in the deed sufficient to justify him in discounting the natural effect of a provision which seemed to require that the purchase should be made only upon request, and he found that justification in the circumstance that the request to be made was not personal to the husband or the wife but extended even to such an uncertain person as the administrator of the survivor of them, it appearing to him impossible that the parties could have meant that upon the request of a person so fortuitous and contingent was to depend the question whether the settled property should or should not assume the character of land. He found further support for the construction which he placed upon the deed in the fact that there was no provision to be found in it having reference to the settled fund as being money or anything else than land.

The principle of *Thornton* v. *Hawley* (1) has been applied in the modern case of *Attorney-General* v. *Dodd* (2) and was assumed by Eve J. to be applicable to the document before the Court in *In re O'Grady's Settlement.* (3) In each of these cases, however, there was expressly given to the trustees a discretionary trust for sale after the death of those whose consent during life was prescribed, and neither of these cases in my opinion assists Mr. Hartree's contention further than does the case of *Thornton* v. *Hawley* (1) itself.

(1) 10 Ves. 129.

(2) [1894] 2 Q. B. 150.

(3) [1915] 1 Ch. 39.

On the other hand in *In re Taylor's Settlement* (1), where certain houses were conveyed to trustees upon trust at the request of the husband and the wife or the survivor of them to sell and where there were in the deed subsequent provisions showing that the trust premises might still after its execution retain their character of real estate, it was held by Turner V.-C. that if the houses were sold pursuant to the trust the proceeds became personal estate, but that the property until sale was to remain and be considered as real estate, and his Honour expressed the view that the question whether a provision requiring a request to a sale was inserted for the purpose of enabling the cestuis que trust to enforce the obligation to sell or was inserted for the purpose of placing a fetter upon the exercise of the trust was one which must be determined as the context of the instrument might require.

The result of the authorities accordingly appears to me to be that there is no rule which requires the Court to place any other than a natural construction upon such a clause as has here to be construed, and certainly not in a case like the present where the consent required is one which is to be given by the settlors themselves and no others, where the deed itself appears to contemplate that the real estate comprised in it retains after execution of the deed its character of realty, and where unaccompanied by the request there is in terms no trust for sale at all.

I was, however, admonished to remember that authorities upon the construction of other deeds are of little value in determining the true effect of such a phrase as has here to be interpreted. I recognize the propriety of the warning, and I have resorted to the authorities not for the purpose of ascertaining the proper effect of the words, but for the purpose of seeing whether they lay down a rule so imperative as to require that some special meaning shall be attributed to them irrespective of what might be their natural signification.

Now for the reasons I have given it appears to me that the authorities lay down no such rule upon the subject, and, treating this deed apart altogether from authority, I am of opinion, and

(1) 9 Hare, 596.

YOUNGER J. 1915 GOSWELL'S TRUSTS, *In re.*

so hold, that the intention of the conveying parties here, as is shown by the language they have used, was that no sale should be made unless each of them in writing requested it. It is to my mind at least as likely that they desired to reserve to themselves the ordinary right of requiring a partition to which as co-owners they were by law entitled as that they should have intended to confer upon the trustees an imperative trust for sale the exercise of which could not be stopped unless they all so required and the existence of which completely deprived any of them of the right to claim partition of the properties, separate and distinct as they were: see *Biggs* v. *Peacock*. (1) This consideration is not weakened although perhaps it is wrong to say it is confirmed by that which as I understand is the fact that it is to a partition of the unsold properties that all parties now desire to resort.

In my opinion, therefore, whether regard be had to authority or whether authority be disregarded the result is the same, and I must hold that the real estate comprised in this deed and still unsold retains its character of real estate and that the provisions of the Settled Land Acts are applicable to the interest of the infant applicant therein.

[His Lordship accordingly made a declaration that on the true construction of the deed of April 12, 1910, there was no conversion of the real estate into personalty unless and until a request in writing for a sale was made by Annie Goswell, H. Goswell, and W. E. Goswell, and ordered a reference to chambers to appoint persons under s. 60 of the Settled Land Act, 1882, to exercise the powers of the Settled Land Acts, 1882 to 1890, on behalf of the infant plaintiff during his minority or until further order, and directed that capital moneys received by them should be paid into Court.]

Solicitors for all parties: *Bowker Weldon & Bowker.*

(1) (1882) 22 Ch. D. 284.

W. I. C.

C. A.
1915
May 7, 14.

In re JOICEY.
JOICEY *v.* ELLIOT.

[1914 J. 2001.]

Will — Power of Appointment — Special Power — Delegation — Exercise — Invalidity.

A testator gave a sum of money to trustees upon trust to pay the income to his daughter for life and after her decease as to the principal in trust for her issue born in her lifetime "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint, and in default of appointment for all her children equally. The daughter, in exercise of the power, by her will appointed the trust fund among all her children who should survive her and being male attain twenty-one or being female attain that age or marry under it; and she declared that during the period of twenty-one years from her death the income of each child's share should be paid to the child, and if the child should die within the period of twenty-one years the child should have a power of appointment by will, and subject thereto in the event of the child leaving issue in trust for such child absolutely, but in the event of the child leaving no issue then the share was to go by way of accruer to the other shares. If the child should survive the period of twenty-one years the child was to take absolutely: "provided always that the said trustees" (of the testator's will) "shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely":—

Held, that the power conferred upon the trustees by the proviso was an attempt to delegate the power given by the testator to his daughter and was therefore an invalid exercise of that power.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J.

John Joicey by his will dated August 6, 1879, after appointing the plaintiff, Lord Joicey, his brother Edward Joicey, and his widow to be his executors and trustees and devising certain real estate to the uses therein declared, bequeathed to each of three of his daughters Alice, Rose (afterwards Mrs. Elliot), and Eve Joicey the sum of 50,000*l.* to be held by his trustees upon the same trusts and subject to the same powers and provisions as were thereinafter expressed concerning such daughter's share of his residuary estate, and he devised and bequeathed his

C. A. 1915 — JOICEY, *In re.* JOICEY *v.* ELLIOT.

residuary real and personal estate to his trustees upon trust for sale, conversion, and investment and to stand possessed thereof in trust for all his children living at his death. And the testator declared that his trustees should invest each daughter's share and the legacy of 50,000*l.* and hold the same upon trust to pay the income thereof to such daughter during her life and after her decease then in trust for all or any of the issue of such daughter "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint, and in default of appointment in trust for the child if only one or for all the children equally if more than one of such daughter, and the testator empowered his trustees to apply the whole or any part of the income of any legacy thereby given or of the share of his residuary estate to which for the time being any infant legatee would if of the age of twenty-one years be absolutely entitled in possession for or towards the maintenance or education or otherwise for the benefit of such legatee during minority.

The testator died on August 15, 1881.

The plaintiff was now the sole surviving trustee of the will.

The testator's daughter Mrs. Elliot (hereinafter called "the testatrix") by her will dated March 1, 1910, in exercise of the power of appointment given to her by her father's will appointed that the trust fund should after her death be held by the trustees of her father's will in trust for all or any of her children who should survive her and being male should attain twenty-one or being female should attain that age or marry under it, and if more than one in equal shares. And the testatrix directed that the share of the appointed funds to which any child of hers should become entitled under the appointment should be retained by the trustees of her father's will upon the following trusts: During the period of twenty-one years from her death to pay the income of such share to such child if he or she should so long live and in the case of a female for her separate use without power of anticipation during coverture. If such child should die within the said period of twenty-one years then the trustees should hold such share and the income thereof in trust for such person or persons and for such purposes and in

such manner in all respects as such child should by will or codicil appoint, and in default of and subject to such appointment, in the event of such child of the testatrix leaving any issue him or her surviving, in trust for such child of the testatrix absolutely, but in the event of such child not leaving any issue surviving then such share and the income thereof should go and accrue by way of addition to the share or shares in the appointed funds of her other children who should survive the testatrix and being male should attain the age of twenty-one years or being female should attain that age or marry under it, and if more than one in equal shares. If such child of the testatrix should survive the said period of twenty-one years the trustees should hold the share or shares whether original or accruing of such child and the income thereof in trust for such child absolutely: "Provided always that the said trustees shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years, or any part of such share or shares, to such son for his own use absolutely."

The testatrix died on January 12, 1912, leaving her surviving five children, only the eldest of whom, Robert Barnewall Elliot, attained twenty-one on October 30, 1914, the rest being infants and unmarried.

On December 7, 1914, a summons was taken out by Lord Joicey as plaintiff against the testatrix's children as defendants for the determination (inter alia) of the question whether the power given by the testatrix to the trustees of the will of the testator in their absolute discretion to transfer and make over the share of any son of the testatrix who should attain twenty-one or any part of such share to such son was valid and exercisable by the plaintiff.

Joyce J. declared that according to the true construction of the will of the testator the power in question was not valid nor exercisable by the plaintiff.

The testator's grandson Robert Barnewall Elliot appealed.

C. A. 1915 — JOICEY, *In re.* JOICEY *v.* ELLIOT.

P. O. Lawrence, K.C., and *W. H. Draper*, for the appellant. This is a valid exercise of the power. It is within its limits and objects and does not import any stranger. It may be regarded as a mere extension of the power of advancement. It is said that the testatrix has delegated the exercise of her power of appointment to the trustees. But that is not so; she has declared the interests which the objects of the power are to take and the proportions and manner in which those interests are to be taken, and has then added a proviso that the trustees may in certain cases accelerate the possession of those interests: Farwell on Powers, 2nd ed. p. 441; *De Bussche* v. *Alt.* (1)

[LORD COZENS-HARDY M.R. I do not think that case has any application.]

To hold that this is a bad exercise of the power would be to put a very narrow construction on the will: *Ingram* v. *Ingram* (2); *Chester* v. *Chadwick.* (3)

[WARRINGTON L.J. referred to *White* v. *Grane.* (4)]

The true test is whether the delegation is at all within the authority bestowed by the creator of the power upon the donee.

Roope Reeve, for the three infant brothers of the appellant.

W. R. Sheldon, for the plaintiff. The plaintiff desires to exercise the power which is delegated to him if he can properly do so. There is no case, however, in which the donee of a power has been held at liberty to delegate its exercise by enabling a trustee to accelerate the possession of the interests conferred by the appointor upon the objects of the power: *In re Baldock* (5); Davidson's Precedents in Conveyancing, 3rd ed., vol. iii. pt. i. p. 159; Key and Elphinstone's Precedents in Conveyancing ,10th ed., pp. 81, 881; *In re Greenslade.* (6) The donor intended the whole discretion to be exercised by the donee.

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

(1) (1878) 8 Ch. D. 286.
(2) (1740) 2 Atk. 88.
(3) (1842) 13 Sim. 102.
(4) (1854) 18 Beav. 571.
(5) (1904) 48 Sol. J. 492.
(6) [1915] 1 Ch. 155.

May 14. LORD COZENS-HARDY M.R. The question in this appeal is whether a power conferred by the will of the appellant's mother can be legally exercised.

Under the will dated in August, 1879, of the appellant's grandfather Colonel Joicey a large sum of money was given to trustees upon trust to pay the income to the appellant's mother for life and after her decease as to the principal "In trust for all or any of the issue of my same daughter including grandchildren and more remote issue born in her lifetime for such interests in such proportions and in such manner in all respects as my same daughter shall whether sole or covert by deed exercised in the presence of and attested by one or more witness or witnesses or by her will or any codicil thereto appoint and in default of such appointment and so far as the same if made shall not extend in trust for the child if only one or all the children equally if more than one of the same daughter."

The testator died in 1881. The appellant's mother died in January, 1912, having in exercise of the power contained in Colonel Joicey's will appointed the trust funds in trust for all or any of the children or child who should survive and being male should attain the age of twenty-one or being female should attain that age or marry under it, and if more than one in equal shares. The trusts declared of the share of each child were as follows: During the period of twenty-one years from the date of her death the income of the share was to be paid to the child. If the child should die within the period of twenty-one years the child had a general power of appointment by will, and subject thereto, in the event of the child leaving issue, in trust for such child absolutely, but in the event of the child not leaving any issue then the share was to go by way of accruer to the other shares. If the child should survive the period of twenty-one years the child takes absolutely. Then follows a proviso: "Provided always that the said trustees shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or

C. A. 1915

JOICEY, *In re.* JOICEY *v.* ELLIOT.

Lord Cozens-Hardy M.R.

any part of such share or shares to such son for his own use absolutely."

The appellant, who is the eldest child, has attained twenty-one and is married, and Lord Joicey, who is now the sole trustee, desires to exercise this power if he can. Joyce J. has held that it is an attempt to delegate the power given to the mother by the grandfather's will and that the power is invalid. There are numerous authorities which show that a power given to A. to appoint among children cannot be well exercised by A. empowering B. to exercise the discretion vested in A., but that principle does not, it is urged, apply to a case like the present where the share of the appellant is fixed by the mother and where in substance the power is merely a power of advancement. The only point is whether the terms of the grandfather's will, which authorizes the mother to appoint "for such interests in such proportions and *in such manner* in all respects as the mother should appoint," did not suffice to authorize this particular manner of providing for the appellant, namely, by advancing to him all or any part of the share to which he is contingently entitled.

In my opinion this contention cannot prevail. The proviso is an attempt to enable the trustees in their absolute discretion to alter the devolution of the estate, to turn the appellant's contingent interest into an absolute interest, and to destroy the interests to which younger children and their issue may in certain events become entitled. It is altogether beyond an ordinary power of advancement, as to which there might possibly be some argument.

The draftsman of this will was obviously a skilled conveyancer. He felt and expressed a doubt as to the validity of this proviso. I think his doubt was well founded. The decision of Joyce J. was correct and the appeal must be dismissed.

PICKFORD L.J. I think this appeal should be dismissed. Under the will of the testatrix's father certain property was devised and bequeathed upon trust to pay the income to the testatrix for life and after her decease in trust for her issue in such proportions and in such manner in all respects as she should

appoint. It is not necessary to consider the trusts in default of appointment.

By her will the testatrix appointed that all her share under her father's will should be held by the trustees of her will in trust for all her children who should attain twenty-one years or being females marry in equal shares and directed that the share of each child should be held in trust to pay the income to such child for twenty-one years from the testatrix's death. In case any such child should die within twenty-one years his or her share and the income thereof were to be held in trust for such persons as he or she should appoint and subject to such appointment in trust for the issue if any of such child. If such child died without having appointed and without leaving any children his or her share and the income thereof was to go in addition to the shares in the appointed fund of other children. If such child of the testatrix survived the said period of twenty-one years the trustees were to hold the shares and the income of such child in trust for him or her absolutely.

The testatrix then added a clause empowering the trustees (if and so far as she could authorize them) from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of any son of the testatrix who should have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely.

The question is whether the trustee can exercise this power or whether it amounts to a delegation to the trustee of a power only exercisable by the testatrix.

If exercised it may clearly interfere with the rights of other persons under the testatrix's will. If any son dies within the period of twenty-one years without having made any appointment leaving children his share goes to his children, if he dies without having appointed and without leaving children it goes to the testatrix's other children, but if this power be exercised the rights of those persons are gone.

I think that such a power is one which can only be exercised by the testatrix herself and cannot be delegated by her to the trustees of her will.

C. A. 1915 — JOICEY, *In re.* JOICEY *v.* ELLIOT. — Pickford L.J.

It was argued that it was only a power of maintenance or advancement and so not within the prohibition of delegation.

I do not think it is a power of maintenance or advancement at all. It is not confined in any way to circumstances requiring maintenance or advancement and may be exercised by the trustees irrespective of such considerations.

It is not necessary therefore to consider what would be the result if it were only a power of maintenance and advancement.

WARRINGTON L.J. The question in this case is whether a certain provision contained in an appointment made in exercise of a special power is valid and effectual or is inoperative as not being authorized by the power.

Under the will of John Joicey, dated August 6, 1879, certain funds were held upon trust for his daughter Rose Elliot for life and after her death "in trust for all or any of the issue of Rose Elliot including grandchildren and more remote issue born in her lifetime for such interests in such proportions and in such manner in all respects" as she should by deed or by will appoint.

[His Lordship stated the material provisions of the two wills and continued:]

The question is whether the provision that the trustees may transfer a son's share to him is valid and effectual. The contention of the trustees on behalf of the younger children and the unborn issue is that it is in excess of the authority conferred by the power inasmuch as it amounts to a delegation to another person of the function of determining the shares and interests of the several children or issue, a function which by the terms of the power is to be performed by the donee herself.

The words of this power are wide. They are for such interests in such proportions and in such manner in all respects as the donee shall appoint. It may I think be conceded that these words are wide enough to enable the donee to attach conditions affecting either by way of acceleration, defeasance, or otherwise the nature of the interest; as, for example, a provision that if a son should marry a particular woman or enter a particular firm or become entitled under the will of a person then living to an

estate, the trustees should at once transfer his share to him or that the share should pass by way of defeasance to another object of the power, and this notwithstanding that in each of these cases the immediate transfer of the share or its defeasance as the case may be would depend on the volition of a person other than the donee of the power. But in my judgment the provision we have to deal with is one of a different nature. It is not even a mere power of advancement which might possibly be said to be so common an incident to such interests as the donee has here created as to be fairly within the words "in such manner in all respects"—as to this I express no opinion. It is I think impossible to deny that under the provision in question the trustees might of their own mere motion and without reference to the circumstances of the son or any other consideration convert a contingent interest into an absolute one and thus completely alter the dispositions made by the testatrix. To give such a power as this to the trustees is in my opinion to delegate to them an authority reposed in the appointor alone, and the provision in question is accordingly void as being in excess of the power. I think the order appealed from must be affirmed.

Solicitors for all parties: *Stibbard, Gibson & Co.*

G. A. S.

C. A.
1915
SARGANT J.
March 30, 31.

ROBSON *v.* PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

[1915 R. 497.]

C. A.
April 26;
May 6.

Company—English Company with Alien Enemy Shareholders—Right of Alien to vote at Meetings—Licensed English Branch of Alien Enemy Bank—Intercourse—Trading with the Enemy Act, 1914 (*4 & 5 Geo. 5, c. 87*), *s. 1, sub-s. 2—Trading with the Enemy Proclamation, No. 2, clause 6.*

During a state of war an alien enemy is not entitled to exercise a right of voting in respect of shares in an English company, but the right is suspended during the war.

The Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, No. 2, are not exhaustive in the sense that anything not expressly prohibited by them must be taken as permitted. Inquiry must still be made whether acts not therein mentioned are prohibited by the common law or by statute, and by common law not only commercial intercourse but all intercourse with an alien enemy is prohibited.

Where an alien enemy bank, which is a shareholder in an English company, cannot vote in respect of its shares, a branch of the bank locally situated in England is not within the proviso in clause 6 of the Trading with the Enemy Proclamation, No. 2, and cannot exercise the right of voting, although it holds a licence from the Secretary of State under the Aliens Restriction (No. 2) Order in Council and the Aliens Restriction Act, 1914, which is silent on the subject of voting.

Decision of Sargant J. affirmed.

The defendant company was incorporated in England on April 4, 1910, under the Companies (Consolidation) Act, 1908, as a company limited by shares, and its nominal capital at the time of the motion below mentioned was 3,750,000*l.*, divided into ordinary and preference shares.

The motion before the Court was by the plaintiff, who sued in the action on behalf of himself and all other the shareholders of the defendant company except five other persons joined as co-defendants—namely, Broad, Gilmour, Jackson, Lings, and Whittaker—for an order that these five defendants and each of them might be restrained until the trial of the action or further order from acting or purporting to act as directors or a director of the defendant company; and that the company might be similarly restrained from allowing its five co-defendants and

each of them to act or to purport to act as such directors or director as aforesaid.

The five persons above named had been (in effect) declared by the chairman of a meeting of the preference shareholders, Sir Frank Crisp, to be duly elected directors of the company according to a resolution declared to be duly passed at the meeting. On a poll being taken he disallowed a number of votes given by the Direction der Disconto-Gesellschaft, which was incorporated in the German Empire and had its head office in Berlin and a branch in England, on the ground that a shareholder who was an alien enemy could not, during the war, vote at a meeting of the company. After the rejection of these votes there was an overwhelming majority in favour of the five defendants, who, accordingly, were declared to be duly elected.

The business of the Disconto-Gesellschaft (below called "the German Bank") was being conducted in the United Kingdom under a licence granted by the Secretary of State in pursuance of the power conferred on him by the Aliens Restriction (No. 2) Order in Council, 1914, made under the Aliens Restriction Act, 1914, Sir William Plender being the controller appointed by the Secretary of State. The licence, originally granted on August 10, 1914, was subsequently abrogated, and a new licence, dated September 19, 1914, under the hand of the Home Secretary, was granted and was as follows:—

"In pursuance of the powers conferred on me by the Aliens Restriction (No. 2) Order in Council, 1914, made on August 10 under the Aliens Restriction Act, 1914, I hereby permit

The Deutsche Bank,
The Dresdner Bank,
The Disconto-Gesellschaft,

to carry on banking business in the United Kingdom, subject to the following limitations, conditions, supervision and requirement as to the deposit of money and securities:—

"1. The permission shall extend only to the completion of the transactions of a banking character entered into before August 5, 1914, so far as those transactions would, in ordinary course, have been carried through or with the London establishments. The permission does not extend to any operations for the purpose of

C. A. 1915 — ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the banks other than the London establishments. No new transactions of any kind save such as may be necessary or desirable for the purpose of the completion of the first mentioned transaction shall be entered into by or on behalf of the London establishments of the banks.

"2. The business to be transacted under this permission shall be limited to such operations as may be necessary for making the realisable assets of the banks available for meeting their liabilities, and for discharging their liabilities as far as may be practicable.

"3. All transactions carried out under this permission shall be subject to the supervision and control of a person to be appointed for the purpose by the Treasury, who shall have absolute discretion (*a*) to refuse to permit any payment that may appear to him to be contrary to the interest of the nation; (*b*) to permit any such new transactions as are in his opinion necessary or desirable for the purpose of the completion of the transactions first mentioned in paragraph 1; (*c*) to permit or to refuse to permit the completion of any particular transaction whatsoever.

"4. Any assets of the banks which may remain undistributed after their liabilities have, so far as possible in the circumstances, been discharged, shall be deposited with the Bank of England to the order of the Treasury."

Sir William Plender, or some one acting on his behalf, gave his approval to the proxy, but this was withdrawn before the meeting on the ground that it had been countersigned on his behalf without his knowledge and under a misapprehension. He also expressed the opinion that the giving or withholding a proxy was not a matter which concerned him.

The plaintiff, in paragraph 2 of an affidavit sworn by him in support of the motion, said: "It is the fact that the shares in the defendant company . . . . originally belonged, as to 150,000 thereof, to the K. K. Priv. Oesterreichische Credit Anstalt für Handel und Gewerbe, Vienna, Austria, and as to 8000 thereof to Laupenmuhlen and Company of Berlin. All of the said shares were in fact, many months before the outbreak of the war,

pledged by the said company and firm respectively with, and transferred to, the London branch of the Disconto Gesellschaft to secure advances made by that branch for sums amounting in the aggregate to a sum far in excess of the present value of the said shares. The said shares are still held by the London branch as security for the said advances, which still remain unpaid (as I am informed by Mr. Winkelmann, one of the managers of the said branch, and verily believe). The proxy given to me in respect of the said shares, being the proxy of the Direction der Disconto-Gesellschaft . . . . was given under the seal of the London branch and was signed by Mr. Karbe and Mr. Guhschof, the managers of the said London branch. The former is a German subject residing here under licence, and the latter is a Russian subject."

The motion was heard before Sargant J. on March 30, 31, 1915.

Gore-Browne, K.C., and *Fairfax Luxmoore*, in support of the motion. The German bank, as a shareholder in the defendant company, has not by reason of the war lost its right of voting during the war at meetings of the company. Sect. 1, sub-s. 1, of the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), provides that a person who during the war trades with the enemy "within the meaning of this Act" shall be guilty of a misdemeanour. Then, by sub-s. 2, "for the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy." There is nothing in the Act or any proclamation under it which forbids or deals with the case of an alien enemy shareholder exercising his right of voting at a meeting of an English company, and it is submitted that the Act and the Trading with the Enemy Proclamation, No. 2 (which was made on September 9, 1914, and supersedes the earlier proclamations), are exhaustive, and anything not expressly forbidden by them must be taken as permitted.

C. A. 1915 ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

If, however, the Act and Proclamation are not exhaustive, and outside things are, within the common law, forbidden, we say that under the common law all that was so forbidden was commercial intercourse or trading, in a wide sense possibly, between British subjects and alien enemies. The exercise of rights incidental to property, such as the right to vote now claimed, is not commercial intercourse or trading, in however wide a sense that expression may be used. A Court of Equity, at any rate, will, at the instance of an alien enemy, take steps to protect property in which he is interested: *Ex parte Boussmaker.* (1) In Lindley on Companies, 6th ed. p. 53, it is said that *Ex parte Boussmaker* (1) "tends to show that such a person"—namely, a member of a company who becomes an alien enemy by a declaration of war—"would not ipso facto cease to be a member; but rather that his rights and liabilities would be suspended during the war, and might be enforced upon the restoration of peace." There is no direct judicial authority on the point involved.

By clause 24 of the Aliens Restriction (Consolidated) Order, 1914, an alien enemy is not to carry on banking business except under certain restrictions imposed by the Secretary of State. Under that provision the English branch of the German bank has obtained a licence from the Home Secretary, but that licence does not forbid voting as a shareholder in an English company.

The business in England is carried on by a branch of the German bank, and the case seems to come within clause 6 of the Trading with the Enemy Proclamation, No. 2, which provides that "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Martelli, K.C., and *H. E. Wright*, for the defendant company. The Trading with the Enemy Act and Proclamation are certainly not exhaustive as to what is trading with the enemy, for the former expressly includes anything which is trading with the enemy within the statute. In Westlake on International Law, 2nd ed., Part II., "War," pp. 53, 54, the doctrine that "all commercial communication with enemy subjects is forbidden" is

(1) (1806) 13 Ves. 71.

recognized; and it is added that "the prohibition of commercial intercourse with enemy subjects will during the war prevent the shareholders from exercising voting powers, while the enemy directors, who cannot continue to fill their places while their duties would be in suspense, must be regarded as deprived of that character from the outbreak." The old cases have been recently examined by the President of the Admiralty Division in *The Panariellos* (1), who decided that not only commercial intercourse but all intercourse with an alien enemy is prohibited by the common law. And in *Rex* v. *London County Council* (2) Lord Reading C.J. intimated his opinion that an alien enemy could not vote by proxy in respect of his shares in an English company.

Under the licence the German bank, or its branch here, can only do what is expressly permitted.

[They also referred to *The Hoop* (3); *Griswold* v. *Waddington* (4); *Orenstein* v. *Koppel.* (5)]

G. M. Simmonds, for the other defendants.

Gore-Browne, K.C., in reply.

Cur. adv. vult.

March 31. SARGANT J. In this action Mr. William Robson, suing on behalf of the shareholders in the defendant company (other than such as are defendants), is seeking a declaration that Mr. John Broad and four other persons have not been validly appointed directors of the Premier Oil and Pipe Line Company (hereinafter called "the Premier Company"). The plaintiff's application is by way of motion to prevent these persons from acting, and the company from permitting them to act, as directors until the trial of the action.

The result of the action and the motion hinges on the question whether, at a recent meeting of the preference shareholders of the company for the purpose of electing five directors, the chairman, Sir Frank Crisp, was right in rejecting votes in respect of a large block of preference shares which were tendered by a proxy on

(1) (1915) 138 L. T. Journ. 484.
(2) [1915] W. N. 103, 154.
(3) (1799) 1 C. Rob. 196.
(4) (1819) 16 Johnson (New York), 438, 504.
(5) (1914) 52 Sc. L. R. 54.

C. A. 1915 ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED. Sargant J.

behalf of a German corporation called the Direction der Disconto-Gesellschaft, which I will hereinafter refer to as "the German bank." If those votes were wrongly rejected by the chairman and ought to have been counted, then five persons other than the defendant Broad and the next four defendants were elected directors, and the present motion must succeed. But if these votes were rightly rejected the motion must be dismissed; for, though in that event the technical result of the meeting was, owing to an informality, merely to reject the nominees of the German bank and not to elect the defendant Broad and the next four defendants (who were the nominees of the English preference shareholders), yet it is quite clear that this infirmity can easily be cured at a subsequent meeting.

The motion involves a very important general question of law on which, so far, there has been no express decision, namely, whether, during a state of war, an alien enemy such as the German bank is entitled to exercise a right of voting in respect of shares in an English company or whether this right is suspended during the continuance of the war.

There is also a subsidiary question of less general importance, namely, whether, even if the German bank itself could not exercise the right, such right was sought to be exercised and could be exercised on behalf of a branch of the German bank within an exception contained in clause 6 of the Trading with the Enemy Proclamation, No. 2, or within a licence dated September 19, 1914, and granted to three German banks (including the German bank now in question) in pursuance of the Aliens Restriction (No. 2) Order in Council made on August 10, 1914, under the Aliens Restriction Act, 1914.

As regards the first point Mr. Gore-Browne contended that there is nothing in the Trading with the Enemy Act, 1914, or in the Trading with the Enemy Proclamation, No. 2, which specifically prohibits the German bank from exercising their right of voting; and that the Act and Proclamation must be taken as exhaustive; and that anything not expressly prohibited by them must be taken as permitted. With the first of these propositions I agree, but from the second I dissent. It seems to me that mere silence in the Act and the Proclamation is not

sufficient to relieve from any prohibition at common law, and accordingly that I must inquire whether the common law would prohibit the exercise of the right of voting. Then, as regards the common law, Mr. Gore-Browne said that all that is forbidden between English subjects and alien enemies is commercial intercourse or trading, though, may be, in a wide sense, and that the exercise of a right incidental to property, such as the right of voting in respect of shares, cannot be properly described as commercial intercourse or trading in however wide a sense. Here, however, it seems to me that the authorities are against this contention. It is quite unnecessary for me to deal with the old cases on the subject, such as the classic judgment of Lord Stowell in *The Hoop* (1) and his later judgment in *The Cosmopolite* (2), because the whole law on the subject was considered only a few days ago by the President of the Probate, Divorce, and Admiralty Division in the case of *The Panariellos* (3), and he there, in an elaborate judgment, has arrived at the conclusion that it is not merely commercial intercourse but all intercourse with an alien enemy that is forbidden by the common law. And the description by Lord Stowell, in *The Hoop* (1), of an alien enemy as "totally exlex" seems to me to involve the suspension of an alien enemy for the time being, not merely from his right of audience in Courts of justice, but also from the exercise of his legal and equitable rights in relation to property in this country. For instance, it can hardly be supposed, to take a case that I put to Mr. Gore-Browne during the argument, that, at common law and apart from the Courts (Emergency Powers) Act, an alien enemy landlord could, during the war, exercise in person or by proxy the ordinary rights of distress against an English tenant of property here.

Further, in another very recent case of *Rex* v. *London County Council* (4) it is clear from certain remarks of the present Lord Chief Justice that the inclination of his mind was distinctly against the exercise by an alien enemy by proxy of his right of voting in respect of shares in an English company, though this was put rather on the ground of his incapacity to give

(1) 1 C. Rob. 196, 201.
(2) (1801) 4 C. Rob. 8.
(3) 138 L. T. Journ. 484.
(4) [1915] W. N. 103, 154.

C. A. 1915

ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

Sargant J.

a proxy here than on the actual suspension of the principal's right.

It is also to be observed that, both in Lindley on Companies, 6th ed. p. 52, and Westlake on International Law, 2nd ed. pt. II., "War," pp. 53, 54, definite views are expressed that alien enemy shareholders are prevented during the war from exercising their rights of voting. It appears to me, therefore, that the weight both of reason and of authority is against the reception of votes tendered by a proxy here on behalf of an alien enemy, whether the rejection be based on the ground of the suspension of the right of voting itself, or on the ground of the incapacity of the proxy here to enter into and carry out the relationship between the alien enemy and himself involved in his acting as the alien enemy's proxy.

I have still to deal with the subsidiary questions above referred to, namely, whether the exercise of the right of voting can be justified as being so exercised on behalf of a branch of the German bank. The true facts are stated, in paragraph 2 of an affidavit of the plaintiff filed on March 29, to be as follows: [His Lordship read the paragraph, and continued:] It is in the first place sought to bring this within clause 6 of the Trading with the Enemy Proclamation, No. 2, which runs as follows: "Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Now Mr. Robson, the deponent, is not a gentleman who appears to have any special means of knowing the affairs of the German bank; and as to the more material parts of the paragraph he does not state his means of information nor does he state his belief. But beyond this, the transaction disclosed is a mortgage of shares before the war by two alien enemy companies, who apparently have no business here, to the German bank, in consideration of the advance of moneys which are said to be the moneys of the branch here—though, of course, it is not suggested that the moneys of the branch here were not the moneys of the German bank; nor, I may observe, does it appear that the shares were transferred to or registered in the name of any one

but the German bank itself. Now, I cannot understand how such a transaction, or anything done in pursuance of it, can be a transaction within clause 6 of the Proclamation in question; nor how the case of the German bank is improved by the disclosure that they are mortgagees only, and that the mortgagors are two alien enemies not carrying on business here. The case is not in any way similar to cases which might be held to fall within clause 6 of the Proclamation, namely, cases where the branch here of the German bank might, if not otherwise forbidden, lend money here to an English subject holding shares in an English company, get registered as owners of those shares, and then claim to vote to protect their security.

Finally, the licence given to the German bank under the Aliens Restriction (No. 2) Order in Council and the Aliens Restriction Act seems to me to weaken rather than support the case of the German bank. On a careful consideration of that licence I cannot find anything to authorize the exercise of the power of voting in question. And on the very terms of the licence the business of the German bank is to be limited to what is thereby authorized. The bank, having accepted the benefit of the licence, are in my judgment bound to conform to its conditions, and therefore, even if (contrary to the opinion already expressed) the exercise of the right now claimed had been within clause 6 of the Trading with the Enemy Proclamation, No. 2, I think that it would have been prohibited by the acceptance by the German bank of the licence in question.

I should add that, though the proxy was originally countersigned on behalf of Sir William Plender, the controller of the German bank, he discovered the mistake, withdrew any approval thereby implied, and communicated the fact of such withdrawal before the giving of any votes under the proxy.

I therefore dismiss the motion, and make the defendants' costs of the motion their costs in the action.

F. E.

The plaintiff appealed. The appeal was heard on April 26, 1915. C. A

Gore-Browne, K.C., and *Fairfax Luxmoore*, for the appellant, repeated the arguments advanced in the Court below, and in

C. A. 1915

ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

addition referred, as authorities to establish the proposition that the intercourse forbidden by the common law was commercial intercourse only, and did not include the right to vote, to *Kershaw* v. *Kelsey* (1); *Williams* v. *Paine* (2); *Gist* v. *Mason* (3); *Sparenburgh* v. *Bannatyne* (4); *Porter* v. *Freudenberg* (5); *West* v. *Sutton* (6); *Venbrymen* v. *Wilson* (7); Westlake's International Law, 2nd ed. pt. II. p. 41.

Martelli, K.C., and *H. E. Wright*, for the defendant company, and *G. M. Simmonds*, for the other defendants, were not called upon, their Lordships intimating that the appeal would be dismissed and that they would give their reasons on another day.

Cur. adv. vult.

May 6. PICKFORD L.J. delivered the judgment of the COURT (Lord Cozens-Hardy M.R., Pickford and Warrington L.JJ.).

PICKFORD L.J. In this case the appellant, suing as on behalf of himself and all other the shareholders in the defendant company except the five last-mentioned defendants, asked for a declaration that certain persons were not validly elected as directors of the defendant company. This involves the question whether a number of votes for which a proxy was tendered were rightly rejected. If they were the directors were validly elected; if they were not, and should have been counted, then other persons were elected as directors. The ground on which they were rejected was that they were tendered on behalf of an alien enemy, namely, a German corporation, the Disconto-Gesellschaft, carrying on business in an enemy country but having an establishment in London, to which a licence had been granted in pursuance of the Aliens Restriction (No. 2) Order in Council of August 10, 1914.

The case raises two questions, one of general importance and one of a subsidiary nature—namely, have alien enemy shareholders a right of voting in respect of shares in a British

(1) (1868) 100 Mass. 561.
(2) (1897) 169 U. S. 55.
(3) (1786) 1 T. R. 84.
(4) (1797) 1 Bos. & P. 163.
(5) [1915] 1 K. B. 857.
(6) (1702) 1 Salk. 2.
(7) (1808) 9 East, 321.

company during the war and of exercising that right by proxy; and, secondly, if there be not that general right, had these shareholders, by reason of the circumstances of this case, that right.

On the general question the argument of the appellant may, we think, be summarized in two contentions—(1.) that the prohibition at common law of intercourse with an alien enemy is limited to commercial intercourse or trading; and (2.) that the transaction in this case did not come within the definition of commercial intercourse. In our opinion neither of these contentions is correct.

The prohibition of intercourse was stated as extending to much wider limits by Lord Stowell in *The Hoop* (1) and *The Cosmopolite* (2), and reference was made in the judgment to writings of jurists on the subject. The statement there contained has been followed in several cases in the Courts of this country, and also in America by such great authorities as Story and Kent. It is not necessary, in our opinion, to examine these cases in detail—as they were very carefully considered quite recently by the President of the Probate, Divorce and Admiralty Division in a case of *The Panariellos* (3), and will be found collected in that judgment. We have not been referred to and we do not know of any case in this country in which any doubt has been thrown upon the statement of the law by Lord Stowell which is adopted by the learned President in the case mentioned.

It was argued before us that these statements were all dicta not necessary for the decision of the cases in which they were made. Assuming this to be the case, they are dicta of such high authority that we should hesitate to differ from them, but in our opinion, so far as they state that the prohibition extends beyond commercial intercourse, they are correct. We were, however, referred to a case of *Kershaw* v. *Kelsey* (4), in which it was held, after a very careful examination of these cases and dicta, that they were not correct and that no intercourse was prohibited except commercial intercourse or trading with the enemy. This case has been followed in other cases in America. As we have

(1) 1 C. Rob. 196.
(2) 4 C. Rob. 8.
(3) 138 L. T. Journ. 484.
(4) 100 Mass. 561.

C. A. 1915 ROBSON v. PREMIER OIL AND PIPE LINE COMPANY, LIMITED.

already said, no such limitation is to be found suggested in any English case, and we cannot agree with it. The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.

The learned judge, Gray J., in *Kershaw* v. *Kelsey* (1), states the law in our opinion correctly when he says the law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries, but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse.

We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden.

That this transaction has such a tendency is clear. The proposed exercise of the votes is for the purpose of obtaining the control and management or a large voice in them of a British trading company which owns amongst other things large property in the enemy's country, and that this may be to the detriment of the interests of this country and the advantage of the enemy cannot be doubted.

We think also that the rejection of these votes may be justified on the narrower ground that this was a commercial transaction. Commercial intercourse is not confined to making contracts between an alien enemy and a British subject, and such a transaction as this directed to obtaining the control of a trading company is in our opinion commercial.

It follows from what has been said that the employment

(1) 100 Mass. 561.

of a British subject as proxy to exercise the voting power is an intercourse between him and the alien enemy which is prohibited.

On the subsidiary point we do not think it necessary to add anything to what has been said by Sargant J. Whatever may be the proper definition of a branch or transactions with a branch within the meaning of clause 6 of the Proclamation, we think it clear that this is not such a transaction with a branch. The licence does not authorize such a transaction, and it was not argued before us that it did.

In our opinion the judgment of Sargant J. was quite right, and the appeal must be dismissed with costs.

Solicitors: *Mayo, Elder & Co.; Ashurst, Morris, Crisp & Co.*

H. C. R.

In re TUBBS.
DYKES *v.* TUBBS.

[1914 T. 1657.]

Settled Land—Equitable Tenant for Life and Remaindermen—Freehold Houses let on Long Repairing Leases at Ground Rents—Power of Management in Trustees—Trustees' Costs of Management—Costs of Survey for Repairs and of serving Notices to repair—Power of Court to direct such Costs to be paid out of Capital—"Proceedings proposed to be taken for protection of settled land"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 36.

A testator, who died in 1891, devised a freehold estate to trustees upon trust to permit his wife to receive the rents, profits, and income thereof during her life, and after her death upon trust for the remaindermen therein named. The testator empowered his trustees to manage the said estate and to pay the "costs of management out of the rents and profits." The estate consisted of 650 houses let upon long building leases at ground rents amounting to 2100*l.* a year. In 1913 the trustees incurred costs of upwards of 1100*l.* in having the estate surveyed and in serving notices with schedules of repairs required on the tenants with a view to proceedings for enforcing their covenants to repair:—

Held, that the Court had power to direct these costs to be paid out of capital under the Settled Land Act, 1882, s. 36, as being "costs of proceedings" proposed to be taken for the protection of settled land.

Decision of Neville J. ([1915] 1 Ch. 540) approved as to the

C. A.
1915
TUBBS, *In re.* DYKES *v.* TUBBS.

construction of the will, but reversed on the ground (not taken before him) that the Court had power under the Settled Land Act to allow the costs out of capital notwithstanding the will.

R. TUBBS by his will, dated December 12, 1889, devised his Harlesden estate to trustees upon trust to permit his wife to receive the rents, profits, and income thereof during her life, and after her death upon trust for the remaindermen therein named. The testator empowered his trustees, with the consent of his wife during her life, to sell his said estate and deal with the proceeds as therein mentioned. And he declared that it should be lawful for his trustees to manage the said estate until it should be sold, and to repair and insure houses and buildings and to make allowances to and arrangements with tenants, and also to delegate, either expressly or by implication, all the powers lastly thereinbefore contained to his said wife during her life without being responsible for any loss occasioned thereby, and also to pay the costs of management out of the rents and profits.

The testator died in July, 1891. His wife survived him and was now eighty-one years of age.

The Harlesden estate was a freehold property in the north of London comprising some 650 houses erected about 1881 under building leases for ninety-nine years at small ground rents. The total of the ground rents amounted to 2100*l.* per annum.

In 1913 the trustees instructed surveyors to inspect the property and report on its state of repair. In consequence of their report the trustees served notices to repair, with schedules of repairs required, upon a number of the lessees. These notices were complied with. The costs, charges, and expenses of the trustees relating to the survey, notices, and schedules amounted to 1125*l.*, out of which only 39*l.* was paid by lessees.

The trustees took out this summons for the determination of the question how according to the true construction of the will the balance ought to be borne.

Neville J. held that it formed part of the trustees' expenses of management and must, according to the directions contained in the will, be paid out of rents and profits. (1)

The tenant for life appealed.

(1) [1915] 1 Ch. 540.

Cave, K.C., and *J. I. Stirling*, for the appellant. These costs have not been incurred at the suggestion of the tenant for life and are not strictly expenses of management. They are entirely for the benefit of the remaindermen, and the tenant for life gets no good from them. The costs ought to be distributed between the tenant for life and the remaindermen: *In re McClure's Trusts.* (1) These are something more than ordinary repairs and ought not to fall on the tenant for life. It is the duty of the trustees to see that the property does not fall into decay from want of proper repair, and the burden ought to be thrown upon the estate in such a way as not to fall entirely upon the tenant for life or upon the remainderman: *In re Hotchkys.* (2)

But apart altogether from the will, the Court has power under the Settled Land Act, 1882, s. 36, to "approve of any action, defence, petition to Parliament . . . . or other proceeding taken or proposed to be taken for protection of settled land . . . . and may direct that any costs, charges, or expenses, incurred . . . . in relation thereto . . . . be paid out of property subject to the settlement."

In re Wilkie's Settlement (3) shows that such costs may be directed to be paid though the application is not made till after they have been incurred and the proceedings abandoned. The expenditure here was incurred with a view to proceedings for the protection of the estate by enforcing the covenants to repair, and that was mainly for the protection of the remaindermen.

[PICKFORD L.J. referred to *Clarke* v. *Thornton* (4) as an authority that improvements to settled land could be paid for out of capital under the Settled Land Act, 1882, though there was a power in the will for trustees to make them out of income.

WARRINGTON L.J. Sect. 42, sub-s. 2, of the Conveyancing Act, 1881, authorizes trustees to expend money out of an infant's income in drainage. Drainage is one of the improvements which may be authorized under the Settled Land Act, 1882, but it has never been suggested that the power under the Settled Land Act is ousted by that given to trustees under the Conveyancing Act.]

(1) [1906] W. N. 200; 76 L. J. (Ch.) 52.
(2) (1886) 32 Ch. D. 408, 416, 418.
(3) [1914] 1 Ch. 77.
(4) (1887) 35 Ch. D. 307.

C. A. 1915 — TUBBS, *In re*, DYKES *v.* TUBBS.

In re Thomas (1) is on all fours with this case, for that was a clear case of discretion of the Court. In *Clarke* v. *Thornton* (2) it might be said that the tenant for life could have required the expenses to be borne out of capital.

Debney v. *Eckett* (3) is the exact converse of this case. There the expenses in question were ordered to be paid out of income because they were held to be usual expenses of management. The costs asked for here are clearly not usual expenses of management.

Fairfax Luxmoore, for the trustees.

C. E. Dyer, for the remaindermen. Neville J. thought himself bound by the words of the will. The Settled Land Act was never mentioned before him. The case of *In re Hotchkys* (4) is an authority that repairs ought to be paid for out of income. The trustees have exercised their discretion in incurring expenses, and the will shows out of what fund they are to be borne. The proceedings referred to in s. 36 of the Settled Land Act are proceedings for the protection of the estate against adverse claimants, not proceedings to find out and remedy the state of repair. The first duty of the trustees was to see that the houses were in repair.

[The Court gave leave, by consent, to treat the summons as amended, so as to raise the question whether the 36th section of the Settled Land Act applied.]

LORD COZENS-HARDY M.R. We will not trouble you, Mr. Cave. This case no doubt is an important one, because, looked at in one view, it might give rise to claims by tenants for life to which I am certainly not prepared to give any encouragement. There are two points before us: one is whether, under the construction of the will itself, the expenses to which I will refer ought to be paid out of the income of the tenant for life; the other is whether the Court, acting under the special jurisdiction conferred upon it by s. 36 of the Settled Land Act, 1882, ought, in the exercise of its discretion, to say that these particular costs ought to be paid out of capital notwithstanding the direction in the will. When the matter came before Neville J. the only

(1) [1900] 1 Ch. 319.
(2) 35 Ch. D. 307.
(3) (1894) 43 W. R. 54.
(4) 32 Ch. D. 408.

point raised before him by the summons was whether upon the true construction of the will, and of the language of the clause which I will read, the trustees were justified in taking the costs out of the rents or not.

The testator here was the owner of an estate at Harlesden comprising about 650 houses let at very small ground rents. The total ground rent of the 650 houses was only 2100*l.* a year, that is to say, speaking generally, 3*l.* a house. The testator by his will devised this Harlesden estate to trustees upon trust to permit Fanny Cecilia Tubbs, his widow, "to receive the rents, profits and income thereof"; and then it says with regard to the power to sell: "I declare that it shall be lawful for my trustees but with the consent of my wife Fanny Cecilia Tubbs during her life to sell my said estate or any part thereof and invest the proceeds in any manner for the time being authorised by Act of Parliament as proper for trustees to invest And I declare that it shall be lawful for my trustees to manage the said estate until the same shall be sold including power to cut timber and underwood for sale repairs or otherwise and to repair and insure houses and buildings and to make allowances to and arrangements with tenants and also to delegate either expressly or by implication all the powers last hereinbefore contained to my wife Fanny Cecilia Tubbs during her life without being responsible for any loss occasioned thereby and also to determine whether the proceeds of timber cut or any part thereof shall be treated as income or capital and so that the part treated as capital shall be applied as if the same were proceeds of a sale under the trust hereinbefore contained And also to pay the costs of management out of the rents and profits of the said premises."

The trustees had their attention called to the state of this property by some gentlemen who advised them that a great deal of it was very much out of repair. They then instructed surveyors (competent surveyors I have no doubt) to report upon the various houses comprised in this devise, and their report said that many of the houses were in a very bad state of repair. The trustees then served upon the tenants of the houses notices such as are required by s. 14 of the Conveyancing Act; that is to say notices requiring the tenants to do certain repairs specified in

C. A. 1915 — TUBBS, *In re.* DYKES *v.* TUBBS. — Lord Cozens-Hardy M.R.

the schedule; and stating that if they were not done the trustees would take proceedings to recover possession under that section. The cost of these notices and serving them and so on amounted to 1125*l.* The question was whether this sum (less a small sum which has been recovered) should be payable by the widow or not. The whole income was 2100*l.*, and this took up more than half a year's income. The only question asked by the original summons and argued before Neville J. was on the construction of the will, and on that question I think his decision was perfectly right. I cannot doubt that, under the power of management given by the will and the express power to pay the cost of management out of the rents and profits of the estate, the trustees were perfectly at liberty to say "These are costs of management and they must come out of the rents and profits." But in the course of the discussion we have allowed the summons to be amended so as to bring before our consideration the question whether there is not a power in the Settled Land Act which will enable us to say that these costs can, if we think fit, be paid out of capital. Sect. 36 of the Settled Land Act says this: [The Master of the Rolls read the section.] I cannot bring myself really to doubt that what has been done here is in one view for the protection of the settled land, namely, securing that it shall be kept according to the provisions and having regard to the covenants, by proceedings proposed to be taken for the recovery of land subject to the settlement. If so, and treating the amended summons as an application to the Court for directions, I feel no doubt that the Court, in the exercise of its judicial discretion, could say and ought to say that these costs—this 1100*l.* or whatever it may be—ought to be paid out of capital.

I am very anxious to make this clear: I wish to lend no encouragement whatever to the notion that a tenant for life, under this will or any similar will, who desires to serve notice to the tenant of want of repair, can come here and say that the costs of this ought to be paid out of capital and not out of income. I think in such a case the Court would say No, certainly not; there is no reason why it should be. But having regard to the fact that the property here is all let at small

ground rents, that there are a vast number of houses, that the expense is really much more for the benefit of the remaindermen than of the tenant for life, whose income certainly ought not, unless in dire necessity, to be divided in half by reason of these repairs—having regard to all this and the circumstances of this particular case, I think we ought to make the order which we propose to make, namely, an order based upon s. 36, which will include, of course, the sum of 1186*l.* actually expended and any trustees' costs, and also the costs of this appeal and the costs in the Court below. The costs in the Court below were ordered to be paid out of capital, I understand, and the costs of this appeal ought also to be paid out of capital.

PICKFORD L.J. I am of the same opinion, and I have nothing to add.

WARRINGTON L.J. I agree.

Solicitors: *Corbould, Rigby & Co.*

J. R. B.

SARGANT J. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED.

1915

May 11, 12, 20.

[0061 of 1915.]

Company — Winding-up — Insolvent Shareholder indebted to Company — Executors' Right to share in Surplus Assets subject to setting off the Dividend only on the Debt.

A company incorporated under the Companies Acts, 1862 to 1900, and whose articles of association did not give it any lien on its fully-paid shares for the debt of the holder thereof, went into voluntary winding up on July 15, 1914. Fully-paid shares in the company formed part of the estate of A., who died in 1908, insolvent. A judgment for administration in an action by a creditor of the testator was made in 1909, and the Master by his certificate found the company to be a creditor for 2633*l.*, in which A. had become a debtor to the company. In the winding-up there were surplus assets distributable among the fully-paid shareholders of the company. The liquidator conceded that there was no set-off within the language of the Statute of Set Off and that the case was not one of mutual dealings so as to raise any question of set-off under s. 38 of the Bankruptcy Act, 1883; but he contended that the case was within the broader principle—enunciated in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442, and given effect to in *In re Akerman* [1891] 3 Ch. 212, and a series of subsequent cases—that where a person entitled to participate in a fund was also bound to make a contribution in aid of that fund, he could not be allowed to participate unless and until he had fulfilled his duty to contribute; and that the executors of A. were bound to pay the liquidator the full amount of the 2633*l.* as a term of receiving a share in the company's surplus assets:—

Held, that the facts were analogous to those in *Cherry* v. *Boultbee*, where it was held that a legacy to a bankrupt debtor of the testatrix could only be retained against his assignee to the extent of the dividends on his debt, the executors standing in the same position as the assignee of the bankrupt in that case, and the company in the same position as the executors of the testatrix; and, therefore, that the liquidator was not entitled to retain the testator's share in surplus assets against more than the proper dividend on the ascertained debt.

In re Leeds and Hanley Theatres of Varieties [1904] 2 Ch. 45; *In re West Coast Gold Fields* [1905] 1 Ch. 597; *In re Auriferous Properties* (No. 2) [1898] 2 Ch. 428; *In re Akerman* [1891] 3 Ch. 212; *In re Goy & Co.* [1900] 2 Ch. 149; *In re Rhodesia Goldfields* [1910] 1 Ch. 239; and *In re Brown & Gregory* [1904] 1 Ch. 627 distinguished.

Semble, that the principle of *Cherry* v. *Boultbee*, as developed in *In re Akerman* and *In re Rhodesia Goldfields*, would extend to prevent a person

who was at the commencement of a winding-up both a debtor to and a shareholder of the company from participating in the surplus assets without contributing the amount of his debt.

SARGANT J.
1915
PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

THE Peruvian Railway Construction Company, Limited, was incorporated in the year 1906 under the Companies Acts, 1862 to 1900, and went into voluntary liquidation under a special resolution for that purpose passed on June 29, 1914, and confirmed on July 15, 1914. A large number of fully-paid shares in the company formed part of the estate of William John Alt, deceased (below called "the testator"), who died on November 9, 1908, insolvent and indebted to the company to a considerable amount. The articles of association of the company did not give any lien on its fully-paid shares for the debts of the member holding the same.

Shortly after the testator's death a creditors' action was brought for the administration of his estate, and a decree for administration was made on March 1, 1909. Further, by the Master's certificate, dated December 12, 1913, the company was found to be a creditor of the testator for a sum (including costs) of 2633*l.* 10*s.* 7*d.* (below referred to as "the ascertained debt"). Subsequently, however, to the liquidation of the company, and when there was reason to think that a considerable return might be made on the testator's share capital in the company, the liquidator applied for and obtained an order in the administration action to vary the Master's certificate by striking out his name as a creditor in respect of the ascertained debt, in order that he might be enabled to set up a claim to deduct the ascertained debt from the amount which would be coming to the estate of the testator from its holding in the share capital of the company.

An originating summons in the winding-up was taken out by the executors of the testator, seeking a declaration that the liquidator was not entitled to set off, against the share of the applicants in the surplus assets of the company, any sum due or claimed to be due from the testator or his estate to the company, other than a sum of 473*l.* which had been paid by the company to the applicants, and formed no part of the ascertained debt, and stood on an entirely different footing. The language of the

SARGANT J. summons was quite general, and the only sum to which it in fact applied was the ascertained debt.

1915

PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

The summons was adjourned into Court.

Hon. Frank Russell, K.C., and *Percy F. Wheeler*, for the applicants. By s. 10 of the Judicature Act, 1875, in the administration by the Court of the assets of a deceased person whose estate may prove to be insufficient for the payment in full of his debts and liabilities the same rules prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. The provision of the bankruptcy law as to the set-off in respect of mutual credits, mutual debts, and mutual dealings is contained in s. 38 of the Bankruptcy Act, 1883; but it will scarcely be contended on behalf of the liquidator that there has been such a mutual dealing as to raise any question of set-off under that Act. No part of the money now distributable as surplus assets of the company ever became due to the testator in his lifetime, and the amount due in respect of his shares is held by the liquidator for his personal representatives and has never been held for him. There is therefore no right in the liquidator to set off the debt due from the testator against the share in the surplus assets due to the executors. The liquidator must prove in the administration and can only set off the dividend found due to him against the claim for a share in the surplus assets. Under the old statute relating to set-off of 1729, 2 Geo. 2, c. 22, s. 13, it was held in the Exchequer Chamber that, to an action by an administrator, who sued in his representative character for a debt due after the death of the intestate, the defendant could not set off a debt due to him from the intestate in his lifetime, and it was laid down that, where the intestate and the defendant never stood in the relation of mutual debtors to each other, there was no set-off between the one and the representative of the other: *Rees* v. *Watts*. (1) This is still the law, and there are useful illustrations of its being applied in Courts of Equity—for instance, *Talbot* v. *Frere* (2) (where Jessel M.R.

(1) (1855) 11 Ex. 410, 415.

(2) (1878) 9 Ch. D. 568.

held that where a mortgagor had died insolvent, the mortgagee after paying off his mortgage debt out of the proceeds of sale of the mortgaged estate could not retain the surplus in payment of the mortgagor's simple contract debt); *Hallett* v. *Hallett* (1) (where Fry J. held that the trustees of a settlement of a policy of insurance under which the bonuses were payable on the death of the tenant for life, who died insolvent, were not entitled to set off a claim for trust funds misappropriated by him against the claim of his executrix to the bonuses); and *In re Gregson* (2) (where North J. held that mortgagees of a policy on the life of the mortgagor, who died insolvent, could not set off against his executor's claim to the surplus of the policy moneys, after that mortgage had been paid off, the arrears of an annuity to secure which the mortgagor had mortgaged an estate for his own life). *Rees* v. *Watts* (3) was followed, so recently as 1876, in *Newell* v. *National Provincial Bank of England*. (4)

As regards the money paid over by the liquidator in advance, he has no right to interest on it. There was no agreement, express or implied, as to paying interest, and no notice under the statute.

Gore-Browne, K.C., and *F. Whinney*, for the liquidator. We do not rely on the bankruptcy rule as to set-off or depend on the principles laid down in the cases cited for the executors. The case is not one of set-off, but a case to which there applies the principle laid down in *Cherry* v. *Boultbee* (5), that where a person who is entitled to participate in a fund is also under a liability to contribute to it, he cannot participate until he has contributed, and that case shows that it is sufficient to show that there is a right to receive the debt and a fund or part of a fund payable by the person entitled to receive the debt. In *In re Akerman* (6) Kekewich J. states the rule as follows: "A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes

(1) (1879) 13 Ch. D. 232.
(2) (1887) 36 Ch. D. 223.
(3) 11 Ex. 410.
(4) (1876) 1 C. P. D. 496.
(5) 4 My. & Cr. 442.
(6) [1891] 3 Ch. 212, 219.

SARGANT J. 1915 PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

it." In both the cases cited the fund distributable was part of the estate of a deceased testator, but the principle has been recognized where the fund consists of assets of a company: *In re Goy & Co.*(1); *In re Leeds and Hanley Theatres of Varieties.*(2) The principle is far wider than anything involved in set-off, and applies even where the amount of the debt has not yet been ascertained, and not only as between the original claimant against the distributable fund and the holders of that fund, but also as between those holders and the claimant's transferee: *In re Rhodesia Goldfields*(3); *In re Brown & Gregory.*(4) The case of the executor of a person who has to contribute to assets is weaker than that of a transferee, for in the former case it is the same estate which has to contribute although it is not the same individual. The decisions in *In re Gregson* (5) and *Talbot* v. *Frere*(6) were on the ground that there was no right of set-off: *In re H. E. Thorne & Son.*(7) Here the testator held the shares in his lifetime, and, as they were fully paid, the company had no lien on them for his debt to the company, so that the executors could deal with them; but the shares, even in their hands, were in a company which was subject to the process of winding up, in which case, under s. 186 of the Companies (Consolidation) Act, 1908, its surplus assets were distributable "among the members according to their rights and interests in the company." By s. 126 of the same Act where a contributory dies his personal representatives are "liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly." It is the liquidator's duty to put them on the list of contributories in the capacity of personal representatives of a shareholder, and what they owed to the company was in the same capacity. So, where the holder of shares which are not fully paid is made bankrupt, and the company proves for the estimated liability to future calls and receives a dividend less than 20*s.* in the pound, if the company is afterwards wound up and has surplus assets, the

(1) [1900] 2 Ch. 149, 153.
(2) [1904] 2 Ch. 45.
(3) [1910] 1 Ch. 239, 242, 247.
(4) [1904] 1 Ch. 627; [1904] 2 Ch. 448.
(5) 36 Ch. D. 223.
(6) 9 Ch. D. 568.
(7) [1914] 2 Ch. 438, 445.

bankrupt's estate cannot benefit in their distribution, without first paying the liquidator the difference between the total amount unpaid on the shares and the amount of dividend received: *In re West Coast Gold Fields.* (1) In *In re Auriferous Properties* (No. 2) (2) the company whilst a going concern made calls on its shares, some of which were held by the Gold Properties Company, which itself owed money to the Auriferous Company. Then the latter company was ordered to be wound up, and the Gold Company, which was insolvent, was wound up voluntarily, and it was held not only that the liquidator of the Gold Company could not set off the debt against the calls, but that he could not take any dividend on it until he had paid all the calls. The case of the winding up of a company is analogous to the dissolution of a partnership in which a partner cannot get anything out of the partnership assets until he has contributed what he owes to the partnership.

As regards the claim for interest, the materials are sufficient to enable the Court to hold that there was an implied contract that it should be paid.

Hon. Frank Russell, K.C., in reply. Alt having died insolvent, his estate must be distributed rateably except where the creditors hold security or there have been mutual dealings between him and a debtor. *Cherry* v. *Boultbee* (3) was decided long before the Judicature Act, 1875, was passed. Lord Cottenham there refers to a right of "retainer" of an executor of a creditor, but that was put right in *In re Akerman.* (4) The actual decision in *Cherry* v. *Boultbee* (3) is in favour of the executors in the present case. In *In re Akerman* the report (5) shows that one of the sons advanced had been made bankrupt. The only obligation on the executors is to apply the estate in a due course of administration; they are under no personal liability. In *In re Goy & Co.* (6) Stirling J. stated the equitable rule, but held it to be inapplicable to the case of a transferee of a debenture containing special conditions as to equities between the company and the original holder. *In re Leeds and Hanley Theatres of*

(1) [1905] 1 Ch. 597; [1906] 1 Ch. 1.
(2) [1898] 2 Ch. 428.
(3) 4 My. & Cr. 442.
(4) [1891] 3 Ch. 212.
(5) [1891] 3 Ch. 214.
(6) [1900] 2 Ch. 149.

SARGANT J. 1915 PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

Varieties (1) has no application to the present case. In *In re Rhodesia Goldfields* (2) the principle stated seems to be wrong. In *In re H. E. Thorne & Son* (3) there were mutual dealings resulting in cross-claims before the winding-up. In *In re West Coast Gold Fields* (4) Buckley J. simply followed *Grissell's Case* (5) and did not rest his decision on *Cherry* v. *Boultbee*. (6) [He also referred to *In re Gedney*. (7)]

Cur. adv. vult.

May 20. SARGANT J. (after stating the facts above set out). It is common ground that the amount distributable on the share capital in the company belonging to the testator's estate must considerably exceed the ascertained debt; and accordingly, if the set-off or deduction in question is allowed, the company will in fact be in the position of a fully-secured creditor of the testator and receive 20*s.* in the pound on the ascertained debt. It has been conceded by the liquidator that there is no set-off within the language of the Statute of Set Off (*Rees* v. *Watts* (8)); and further that the case is not one of mutual dealings so as to raise any question of set-off under the Bankruptcy Act. The whole contest has been as to the application to the present case of the much broader principle, enunciated in *Cherry* v. *Boultbee* (6), and given effect to in *In re Akerman* (9) and a series of subsequent cases, that where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute. The liquidator argues that the testator, and his executors as representing him, were and are bound to pay the liquidator the full amount of the ascertained debt as a term of receiving a distribution in respect of the testator's shares. The executors, while acknowledging the general principle, say that they, as representing an insolvent estate, were bound to contribute to the assets of the company, not the full amount of the ascertained debt, but only such a dividend on that sum as

(1) [1904] 2 Ch. 45.
(2) [1910] 1 Ch. 239.
(3) [1914] 2 Ch. 438.
(4) [1905] 1 Ch. 597.
(5) (1866) L. R. 1 Ch. 528.
(6) 4 My. & Cr. 442.
(7) [1908] 1 Ch. 804.
(8) 11 Ex. 410.
(9) [1891] 3 Ch. 212.

the estate might be sufficient to yield; and that on providing this dividend they are entitled to their distribution on the shares. To determine this difference it is necessary to consider somewhat closely both the exact date when the right of retainer or quasi-retainer arose, and the exact persons between whom it arose.

The articles of the company do not give any lien on fully-paid shares such as those in question. And accordingly it is clear that, while the company was a going concern, it had no right of retainer or set-off or any similar right as between the shares and any debt to the company. The testator, or his trustee in bankruptcy if he became bankrupt, or his legal personal representatives if he died, either solvent or insolvent, could realize and deal with the shares altogether irrespective of any such debt. No difference in this respect was made by the allowance of the ascertained debt in the action, and the earliest possible moment at which any right of retainer or set-off or the like could arise was the commencement of the liquidation of the company. At that date the debts owing to the company had to be collected on the one hand, and on the other hand (and this is by far the more important side of the question) the rights in respect of the shares may be considered to have been converted into a right or expectation of receiving a rateable proportion of the surplus moneys remaining after satisfying the liabilities of the company. And I am of opinion that the principle of *Cherry* v. *Boultbee* (1), as developed in *In re Akerman* (2) and in subsequent cases such as *In re Rhodesia Goldfields* (3), would extend to prevent a person who was at the commencement of the liquidation both a debtor to the company and a shareholder of the company from receiving a rateable proportion of this surplus without contributing to the assets of the company the amount of his debt.

But if the date when the right thus arises is July 15, 1914, the persons between whom it arises are the liquidator on the one hand, and the executors of the testator on the other hand. And the amount for which the executors are liable is obviously not the full amount of the ascertained debt, but such dividend on

(1) 4 My. & Cr. 442. (2) [1891 3 Ch. 212.
(3) [1910] 1 Ch. 239.

SARGANT J. 1915 PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

that debt as the executors can pay in a due course of administration. The facts are, indeed, in my judgment precisely analogous to those in *Cherry* v. *Boultbee* (1), where it was held that a legacy from a testatrix to a bankrupt debtor of hers could only be retained against his assignee to the extent of the dividends on his debt. There the Lord Chancellor, Lord Cottenham, said (2): "In the present case, however, the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignee more than the dividends upon the debt; and although the bankrupt had not obtained his certificate, and the liability incident to that state remained upon him, yet he, for the same reason, was never entitled to receive the legacy; and, consequently, there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; the right, therefore, of retaining a sufficient sum out of the legacy to pay the debt can never have been vested in any one." In the present case the executors of the testator stand in precisely the same position as the assignee of the bankrupt debtor, and the company in the same position as the executors of the testatrix.

The actual decision in *Cherry* v. *Boultbee* (1) is the more important, because it was in that very case that the general principle was so completely recognized. And the decision has in fact been expressly followed in two subsequent cases, namely, *In re Hodgson* (3) and *In re Orpen.* (4) Nor can I find that in any of the cases cited by Mr. Gore-Browne or Mr. Whinney this part of the decision in *Cherry* v. *Boultbee* (1) has been in any way dissented from or questioned. *In re Leeds and Hanley Theatres of Varieties* (5) was a very special case, involving cross-claims between two companies both in liquidation, and is of no assistance here. The case of *In re West Coast Gold Fields* (6) was of the same nature as *Grissell's Case* (7) and turned on what was sufficient to satisfy the statutory requirements as to

(1) 4 My. & Cr. 442.
(2) Ibid. 447.
(3) (1878) 9 Ch. D. 673.
(4) (1880) 16 Ch. D. 202.
(5) [1904] 2 Ch. 45.
(6) [1905] 1 Ch. 597.
(7) L. R. 1 Ch. 528.

paying up shares in limited companies. In *In re Auriferous Properties* (No. 2) (1) the same question was involved, and in regard to another part of the decision it is to be observed that the Gold Company had become liable for the call on their shares before the Auriferous Company had gone into liquidation. And in *In re Akerman* (2), *In re Goy & Co.* (3), *In re Rhodesia Goldfields* (4), and *In re Brown & Gregory* (5) there was an entire absence of the special feature present in *Cherry* v. *Boultbee* (6) and in the case before me, namely, the insolvency of the original debtor before the right of retainer or quasi set-off had first arisen.

In this state of the authorities I am of the opinion that both parts of the decision in *Cherry* v. *Boultbee* (6) are binding on me, and I propose to follow that case in its entirety. It was intimated to me that if I took that view, the liquidator would not desire to actually retain any part of the distribution on the testator's shares provided that he was re-admitted as a creditor of the testator's estate for the amount of the ascertained debt. Accordingly, I propose to declare that the liquidator is not entitled to retain this distribution against more than the proper dividend on the ascertained debt, and direct that on his being re-admitted as a creditor of the estate for the amount of the ascertained debt he do pay over the amount of the distribution on the shares to the executors of the testator. The executors should have their costs of the summons out of the assets of the company as between party and party, and the liquidator will take his costs out of the assets as between solicitor and client.

The sum of 473*l.* to which I have already referred represents a payment made by the liquidator to the executors, and it is admitted that the liquidator is entitled to set this off against the distributive sum coming to the executors on their shares. The only question that arises is as to interest. Here all the real merits of the case are in favour of the liquidator. I entertain no doubt that what the parties really intended was at first an advance on account and later on a loan at a reasonable rate of

(1) [1898] 2 Ch. 428.
(2) [1891] 3 Ch. 212.
(3) [1900] 2 Ch. 149.
(4) [1910] 1 Ch. 239.
(5) [1904] 1 Ch. 627.
(6) 4 My. & Cr. 442.

SARGANT J. 1915 PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

interest. But on the correspondence I have reluctantly come to the conclusion that all that was actually agreed upon was a loan without any provision as to interest, and accordingly I am, to my great regret, unable to allow interest in this case.

Solicitors for applicants: *Badham, Comins & Sloman.*
Solicitors for liquidator: *Francis Voules & Co.*

F. E.

C. A. 1915 *April* 23, 26.

ATTORNEY-GENERAL (AT THE RELATION OF HOXTON CINEMA, LIMITED) *v.* SHOREDITCH CORPORATION.

[1914 A. 232.]

Local Government—Public Swimming Bath—Closing during Winter Months—Letting for Cinematograph Entertainments—Baths and Washhouses Act, 1878 (41 & 42 *Vict. c.* 14), *ss.* 5, 6, 7, 8—*Baths and Washhouses Act*, 1896 (59 & 60 *Vict. c.* 59), *s.* 2.

Under s. 5 of the Baths and Washhouses Act, 1878, the defendant corporation, as the authority for administering the Baths and Washhouses Acts, 1846 to 1899, in their borough, had power during such period, not exceeding five months in any one year, as they should think fit, from November to March inclusive, to close their public swimming bath and to either keep the same closed or establish therein a gymnasium or such other means of healthful recreation as they should think fit, or during such period allow the same to be used as an empty building for such purposes of healthful recreation or exercise as they should think fit. By a proviso to s. 5 no covered or open swimming bath, when closed, might be used for music or dancing.

Sect. 2 of the Baths and Washhouses Act, 1896, repealed the proviso to s. 5 of the Act of 1878 and enacted (*a*) that before any closed bath could be used for music or dancing a licence must be obtained; and (*b*) that no portion of the premises in respect of which a licence was granted should be let "otherwise than occasionally," and that no money for admission be taken at the doors.

The corporation closed their swimming bath and let it during the winter months to W. for the purpose of a cinematograph exhibition, having first erected therein a substantial cement operating box and laid over the bath a floor upon which partially fixed seating accommodation was placed. W. then carried on cinematograph performances in the building, and employed a "musical director" to play appropriate accompaniments to the scenes which were exhibited, and took money for admission at the doors. Licences for music and for cinematograph exhibitions were obtained by the corporation from the London County Council.

In an action by the Attorney-General, at the relation of ratepayers

of the borough, for a declaration that the letting to W. was contrary to the provisions of the Baths and Washhouses Acts and ultra vires the corporation :—

Held by the Court of Appeal, affirming the decision of Joyce J., that the performance given in the building was such that a music licence was required; that the music was not merely accessory to but a substantial part of the performance; that proviso (*b*) to s. 2 of the Act of 1896 therefore applied; that what the corporation had done was not merely allowing the bath to be used as an empty building; that the prohibition against letting otherwise than occasionally and against taking money at the doors had been infringed; and that on all these grounds the plaintiffs were entitled to the declaration which they claimed.

APPEAL from a decision of Joyce J.

The relators, the Hoxton Cinema, Limited, were ratepayers of the metropolitan borough of Shoreditch and owned and operated a cinematograph theatre in Pitfield Street, Hoxton, N.

The defendant corporation was the authority in the borough of Shoreditch for administering the Baths and Washhouses Acts, 1846 to 1899.

The Hoxton Public Baths in Pitfield Street, Hoxton, N., were situate in the said borough and were subject to the management, regulation, and control of the defendant council in accordance with the provisions of the said Acts.

Part of the buildings comprising the said public baths consisted of a covered swimming bath.

The corporation in October, 1913, closed the same and let it to the defendant Wright for every weekday during the winter season 1913-14 (from November to March) for the purpose of cinematograph entertainments.

The defendant Wright occupied the said covered swimming bath and premises during the said period under the terms of the said letting or licence, and regularly conducted therein the business and performances of an ordinary cinematograph theatre; by virtue of the licence hereinafter mentioned music was for the period aforesaid habitually performed at the cinematograph performances and as a part thereof. Money for admission to the performance was habitually taken at the doors.

A licence for music had been granted to the defendant council in respect of the said closed swimming bath. Previously to the

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

letting the corporation had put a floor over the bath, had provided partially fixed seating accommodation, and had erected in the building a substantial cement operating box.

The relators alleged that the letting of the closed swimming bath to the defendant Wright was ultra vires the corporation and contrary to the provisions of the Baths and Washhouses Act, 1896, s. 2 (*b*), in that the premises were let for a continuous period and "otherwise" than occasionally to any person or persons," and in that music was performed, and money was taken at the doors (1), and they brought this action claiming (inter alia) a declaration to that effect.

(1) The Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 5, provides: "The council and the commissioners respectively may during such period, not exceeding five months in any one year, as they shall think fit, from the beginning of the month of November to the end of the month of March, close any covered swimming bath or open swimming bath, and may either keep the same closed or may establish therein a gymnasium or such other means of healthful recreation as they shall think fit, or may during such period allow any covered or open swimming bath to be used as an empty building for such purposes of healthful recreation or exercise as they shall think fit during such period as aforesaid, and may at any time allow any portion of the public baths not required by the commissioners to be used for holding vestry meetings or other parochial purposes: Provided always, that no covered or open swimming bath when closed may be used for music or dancing."

Sect. 6. "The council and the commissioners respectively may make bye-laws for the regulation, management, and use of the open or swimming baths when used for any of the purposes mentioned in the fifth section of this Act; . . . ."

Sect. 7. "The council and the commissioners respectively may appoint and remove at pleasure such officers and servants as shall be necessary for the management and superintendence of any gymnasium or other means of recreation established under this Act, and may appoint reasonable salaries, wages, and allowances for such officers and servants."

Sect. 8. "The council and the commissioners respectively may from time to time make such reasonable charges for the use of the gymnasium or other means of recreation established under this Act, or for the use of any covered swimming bath as an empty room, as they shall think fit."

The Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59), s. 2, provides: "From and after the passing of this Act the following proviso to section 5 of the Baths and Washhouses Act, 1878, viz.: 'Provided always that no covered or open swimming bath, when closed may be used for music or dancing,' shall be repealed, so far as the administrative county of London is concerned.

"Provided always—

"(*a*) That the commissioners

The defendants contended that the music performed at the cinematograph entertainments was performed occasionally only as an accompaniment to the exhibition of certain films, and that the music was merely incidental and subsidiary to the entertainments, and did not constitute a substantial or essential part thereof.

They further contended that the acquisition of a music licence was not necessary for the use of the said premises for the purpose of cinematograph entertainments or the music performed in connection therewith, and consequently that the proviso (*b*) to s. 2 of the Act of 1896 did not apply.

At the hearing of the action Joyce J. declared (1.) that upon the true construction of the Acts of 1878 and 1896 the letting which was the subject of the action was unauthorized and illegal; and (2.) that, a licence for music being granted, the corporation was not entitled to let the bath otherwise than occasionally, and no money for admission must be taken at the doors.

The defendant council appealed.

Macmorran, K.C., and *Naldrett*, for the appellants. This is a letting within s. 5 of the Baths and Washhouses Act, 1878. A cinematograph entertainment may fairly be considered as healthful recreation. That expression is not confined to anything ejusdem generis with a gymnasium. The bath is let as an empty building. The provision of the operating chamber and the seating is immaterial. Under the Act of 1878 the use of the premises for

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appointed under the Baths and Washhouses Acts, 1846 to 1896, or any sanitary authority or other representative body to whom the powers of the said commissioners shall have been transferred by any order of the Local Government Board made under the provisions of the Local Government Act, 1894, which commissioners, sanitary authority, or representative body, are hereinafter referred to as 'such commissioners,' shall before any such bath is used for music or dancing obtain a licence from the London County Council . . . .;

"(*b*) That no portion of the premises in respect of which the licence is granted be let otherwise than occasionally to any person or persons corporate or otherwise, and that no money for admission be taken at the doors; . . . ."

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

music or dancing was in terms prohibited, but that provision was repealed by s. 2 of the Act of 1896, which, however, provided that before any closed bath was used for music or dancing a licence must be obtained. A licence is only necessary for public music under the Act of 25 Geo. 2, c. 36. Where music is only incidental to the performance a licence is not required, and where a music licence is not necessary the proviso to s. 2 of the Act of 1896 does not apply. Here the music is merely subsidiary to the cinematograph exhibition and does not form a substantial part of the entertainment: *Quaglieni* v. *Matthews* (1); *Reg.* v. *Tucker* (2); *Brearley* v. *Morley.* (3)

It is true that in this case a music and dancing licence is taken out by the town clerk for the borough council, but if the closed bath is only used for purposes for which no licence is required, then the proviso to s. 2 prohibiting any but occasional lettings and the taking of money at the doors does not apply. There is nothing ultra vires in the letting of this closed bath for the purpose of cinematograph entertainments.

Hughes, K.C., and *A. Guest Mathews*, for the respondents, were not called upon.

J. D. Israel held a watching brief for the defendant Wright, who did not appeal.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Joyce J. and it raises a question as to the user by the defendants of public baths. The learned judge has made a declaration that what the defendants are doing or allowing to be done is not authorized by the Acts of Parliament.

The question depends on the construction of one or two sections of the Baths and Washhouses Acts, s. 5 of the Act of 1878 and s. 2 of the Baths and Washhouses Act, 1896. A public body such as the Shoreditch Borough Council is authorized to erect public baths and washhouses. That power was given by the Act of 1846; and then in 1878 Parliament enacted that public bodies, and the Shoreditch Borough Council is one of them, may "from the beginning of the month of November to

(1) (1865) 6 B. & S. 474; 34 L. J. (M.C.) 116.
(2) (1877) 2 Q. B. D. 417.
(3) [1899] 2 Q. B. 121.

the end of the month of March, close any covered swimming bath or open swimming bath, and may either keep the same closed or may establish therein a gymnasium or such other means of healthful recreation as they shall think fit, or may during such period allow any covered or open swimming bath to be used as an empty building for such purposes of healthful recreation or exercise as they shall think fit during such period as aforesaid, and may at any time allow any portion of the public baths not required by the commissioners to be used for holding vestry meetings or other parochial purposes." There is a proviso to s. 5 which says this: "Provided always, that no covered or open swimming bath when closed may be used for music or dancing." That proviso was repealed by s. 2 of the Act of 1896 which says: "From and after the passing of this Act the following proviso to s. 5 of the Baths and Washhouses Act, 1878," —that is the proviso which I have read—"shall be repealed so far as the administrative county of London is concerned." But it was not an absolute repeal; the repealing clause itself is subject to a proviso, because s. 2, sub-s. (*a*), says that before exercising the powers the public body must obtain a licence, that is to say, before any such bath is used for music or dancing a licence must be obtained from the London County Council in the manner thereinafter prescribed, and sub-s. (*b*) says: "That no portion of the premises in respect of which the licence is granted be let otherwise than occasionally to any person or persons corporate or otherwise, and that no money for admission be taken at the doors."

Counsel for the appellants contended that the user of this public bath for the purposes of cinematograph performances is not a user of itself such as would render a music or dancing licence necessary, because they said that the music is only an incident of or accessory to the main performance, and that there is authority for saying that no music licence is necessary for a public building if music is not a main or important or essential feature of the performance which takes place therein. Then it is said that if it is a case in which a music licence is not necessary, it is quite immaterial that the council have themselves obtained in respect of this building a music and dancing licence,

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

Lord Cozens-Hardy M.R.

and further that the proviso in s. 2, sub-s. (*b*), has no application. I am not at the moment prepared to accept that contention, but accepting it, for the purpose of argument only, it seems to me quite plain that that which has been going on in this public bath is of such a nature that a music licence is required for it. I have had an opportunity since this case was argued of reading the evidence bearing upon the point, and I cannot bring myself to doubt that the music here was not a mere incident, or a mere accessory or a mere subordinate thing, but was really a part, and an important part, of the performance. The defendant Wright employs a person who is described as "musical director" to do something which in my opinion is quite an important and necessary part of the performance and without which I do not think the performance would have been successful. That alone, in my view of the particular facts of this case, is sufficient to decide it. But I do not like to leave it there. The musical part of the entertainment is of this nature: there is a piano and an organ, and sometimes an accompaniment is played on one or sometimes possibly on both instruments at the same time. At all events there is a deliberately advertised performance of music as incidental practically to almost every film which is shown at the performance. But it does not stop there. The only thing that the council can do under s. 5 of the Act of 1878 is to allow the swimming bath to be used as an empty building for the purposes mentioned therein. In my opinion, they have not allowed this bath to be used as an empty building. They have deliberately erected what is called an operating box which appears to be a solid cement structure. This is erected in the gallery obviously for the purposes of this undertaking. I do not think that is in any fair sense of the words allowing the bath "to be used as an empty building." It also of course follows from what I have said that this letting is within the prohibition of a letting "otherwise than occasionally." There is an agreement for a letting for a term of four or five months; and it also falls within the prohibition against taking money for admission at the doors.

In my opinion, for all these reasons, the learned judge in the Court below was quite right in saying that the user of this bath and the letting of it for the purposes for which it is used is

unauthorized by the Act. Therefore this appeal fails and must be dismissed with costs.

PICKFORD L.J. I am of the same opinion. The question is whether what the Shoreditch Borough Council have done here is within their powers under the Baths and Washhouses Acts of 1878 and 1896. They had power to provide swimming baths; they also had power to make use of those swimming baths when they were not required for the purposes of swimming baths, to close them and use them for other purposes, but that power is subject to certain restrictions which are imposed upon that use by the Act of Parliament. We have nothing to do with the reasons for or the justification of those restrictions; we have simply to see whether the borough council have confined themselves within the limits of the restrictions. The first question of restriction appears in the 5th section of the Baths and Washhouses Act, 1878, which provides that the council may "close any covered swimming bath or open swimming bath" within certain months "and may either keep the same closed or may establish therein a gymnasium or such other means of healthful recreation as they shall think fit, or may during such period allow any covered or open swimming bath to be used as an empty building for such purposes of healthful recreation or exercise as they shall think fit during such period." The first part of that section does not apply. The second does, and the question is whether what they have done is allowing a covered or open swimming bath to be used as an empty building for the purposes of healthful recreation. What they have done is to let it for the purposes of a cinematograph show and I do not consider it necessary to decide whether that comes within the words "healthful recreation" or not. I will assume that it does. But the question is whether this bath has been "used as an empty building for such purposes." What the borough council have done is this: they have fitted it up as a cinematograph theatre, they have put in an operating box, they have a certain number of fixed seats making a sort of gallery which may or may not be necessary for the purposes of a swimming bath—I will assume that they are and have nothing to do with its user otherwise. They have then put

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

Pickford L.J.

down a floor and provided rows of chairs which are fastened to the floor for the purpose of steadying them. The rows of chairs are fastened together, and then the end chairs are, as I understand, fastened to the floor for the purpose of preventing them from being moved. Then at the opposite end of the building to the operating box is the screen, or whatever it may be called, upon which the films are shown. That is they have fitted the place up as a cinematograph theatre, and having done that, they let it at an inclusive rent which covers the hall as fitted. Whatever may be the exact limits of the expression "allow it to be used as an empty building for such purposes of healthful recreation or exercise as they shall think fit," it seems to me that what they have done here in fitting up the building with all the fittings that are necessary for the purpose of a cinematograph theatre and so letting it at an inclusive rent cannot by any construction of language be called "allowing it to be used as an empty building." That would be sufficient to dispose of the case. But there is another point which Joyce J. has decided, that is, that the borough council have also exceeded their powers because they have not complied with the conditions that are necessary when the hall is to be used for music or dancing. There is a proviso to the section of the Act of 1878 which I have read which says: "Provided always that no covered or open swimming bath when closed may be used for music or dancing." That is repealed by the Act of 1896, so far as the administrative county of London is concerned. But the repeal is subject to this further proviso: "Provided that the"—borough council in this case—"shall before any such bath is used for music or dancing obtain a licence from the London County Council in the manner hereinafter prescribed, but no portion of the premises in respect of which the licence is granted shall be let otherwise than occasionally, and that no money for admission be taken at the doors."

The first question upon that proviso is whether the room is let for music or dancing. I am quite content without saying whether it is absolutely accurate or not to take the definition which is given in the case of *Reg.* v. *Tucker*. (1) Speaking of a

(1) 2 Q. B. D. 417.

decision which had been given in another case, Cockburn C.J. said that that decision only applied where the music was merely subsidiary to something else which constitutes the real substance of the performance; it did not apply where the music formed an independent attraction and an integral part of the entertainment.

Now applying that test, we have to see whether this bath was let for music or dancing or not. Cinematograph films were shown. They were advertised as being accompanied by music. The gentleman who might perhaps in ordinary language be called "the pianist" is called the "musical director." I do not attach much importance to the words "musical director," but I think the fact that this somewhat magnificent expression is used is worth considering for this reason, that it shows that in the announcement or advertisement of the entertainment that was to be given the promoters thought the music was a substantial attraction to the public, and so they called attention to the fact of the music by using language which would show that it was a matter of importance. The musical director of this entertainment was called before Joyce J., and he described what took place, and in substance it comes to this, that throughout the performance he played appropriate tunes or parts of tunes to practically each film as it was shown, but when a comic scene was shown he did not always play because he could not find an appropriate tune, but whenever he could find a tune that in any way fitted the film that was being shown music was played. There used, a short time ago, to be more singing: the singing has been cut down, but there is evidence that the audience used to join in the songs or in the choruses of the songs or the music that was played, and that would show that the music was an essential part of the entertainment. I notice that the musical director says this in answer to the learned judge, who asked him for an instance of what he played: "If it was a comic film there was nothing to play to, nothing that I could put in applicable to the picture. (Mr. Israel) If it was a pathetic picture, what then? (A.) Yes, always then some crying music, the kind of thing likely to make them cry. (Q.) Did you play right through each film, or did you come in now and again?"—this seems to be an

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

Pickford L.J.

important answer—"I used to stop, occasionally, I wanted a rest"; that is to say, "I played throughout the whole performance except perchance when there was a comic scene to which I could not fit a tune at all, or when I wanted a rest, I was obliged to stop." It seems to me that on that evidence it is impossible to say that this music was not an essential part of the performance, or that this hall was not being used for music. If it were, then it needed a licence, and a licence was held. Then we come to the other restriction: "that no portion of the premises in respect of which the licence is granted be let otherwise than occasionally,"—this could not be called an occasional letting, no one has contended that it could—"and that no money for admission be taken at the doors." It was not, I think, really contended that what was done here was not taking money at the doors. Why the Legislature should have imposed that restriction I do not know: it is there, and that is all I have to say. Therefore in addition to the fact that this swimming bath was not allowed "to be used as an empty building" the borough council have also, as a matter of fact, violated these conditions because they have allowed it to be used for music for which a licence was required, and then allowed a portion of the premises in respect of which the licence is granted to be let otherwise than occasionally, and they have allowed money to be taken at the doors. I think, therefore, that Joyce J.'s judgment was quite right, and that the appeal must be dismissed.

WARRINGTON L.J. The learned judge in this case has made two declarations, each of which it is said is capable of being supported in point of law. The first of the two declarations is this: "This Court doth declare that the letting of the large hall, Hoxton Baths, Pitfield street, by the defendant council to the defendant Wright, effected as stated in paragraph 4 of the amended defence of the defendant council, was not authorized by the Baths and Washhouses Acts, 1846 to 1899, and was illegal." That is the first of the two declarations. With regard to that, the appellants contended that the learned judge was wrong, that the letting was authorized and was not illegal. I turn to the Act of 1878 to see whether the appellants are right in this.

The only part of that Act which is material is s. 5 and only a few words of that section. The borough council say that what they have done is justified by this expression, "may during such period"—that is during the period that the bath is closed—"allow any covered or open swimming bath to be used as an empty building for such purposes of healthful recreation or exercise as they shall think fit during such period as aforesaid." What have they done? They have let this building, together with the chairs on which the audience sit, and they have let it, as I think, distinctly as a cinematograph theatre. The hall is fitted up with all the necessary appliances. There is at one end the operating box, which is a fixture of rather a special nature: it is a very substantial erection; it is one of the things without which the building could not be used for the purposes of a cinematograph theatre. The building at the other end when it takes its winter dress contains, as I judge by the photograph, a platform or stage with a screen in the shape of an ordinary theatrical proscenium on which the pictures are to be thrown. Whether that stage is permanent, that is to say whether it is there when the building bears its summer aspect or not, I do not know, but there in the photograph is a stage with an erection of curtains, possibly, I suppose, to conceal the form of anybody who may be explaining the nature of the pictures, or possibly to conceal the existence of the piano, but there it is, and the chairs, which, as Pickford L.J. has said, are fixed during the performance, are included in the letting: the rent covers not only the use of the building, but the use of those chairs for seating the audience.

Is that allowing the building "to be used as an empty building for the purposes of healthful recreation or exercise"? I will assume that the attending a cinematograph theatre is a form of healthful recreation, though I say nothing one way or the other about it, but, in my opinion, what the defendants have done is certainly not allowing the building to be used merely as an empty building for that purpose. It looks very much as if what the section really contemplated was the allowing the building to be used during these winter months as a sort of covered play-ground into which people might go for the healthful recreation

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

Warrington L.J.

or exercise which is mentioned in the section—whether it could be extended further than that I do not say. In my opinion, therefore, the first of the two declarations is amply justified when one comes to look at the Act of Parliament which was relied upon as authority for what the borough council have done.

The second of the two declarations is this: "And this Court doth declare that so long as a licence for music and dancing shall be granted in respect of the said large hall, the defendant council is not authorized to let the said hall otherwise than occasionally, and that no money for admission may be taken at the doors." Whether or not that declaration is justified depends on the Act of 1896, the Act which repealed the proviso annexed to s. 5 of the previous Act, which said that no covered or open swimming bath when closed might be used for music or dancing.

It is said by the appellants in this case first that the provisions under which music and dancing may be allowed are confined to music and dancing such as would require a licence for the purpose, that if the music which was allowed there was only of such an incidental nature that a licence would not be required, then, notwithstanding that the council had applied for and obtained a licence, the subsequent provisions of the statute would not have taken effect. As to whether the latter part of that contention is good in law or not, I express no opinion, but I think the use to which the borough council has allowed the bath to be put from this point of view is such a use that a licence for music is required. I will not again describe the entertainment. It is enough to say that in my opinion the music was an essential part of the entertainment and cannot be regarded as merely incidental thereto. If that be so, there is an end of the question, because the borough council has obtained the licence and the Act expressly provides "that no portion of the premises in respect of which the licence is granted be let otherwise than occasionally . . . . and that no money for admission be taken at the doors." It is quite plain that the letting would not be justified as merely an "occasional letting," and further it is not disputed that money for admission

was taken at the doors. In my judgment, therefore, the learned judge in the Court below was quite right, and the appeal must be dismissed.

C. A. 1915

ATTORNEY-GENERAL v. SHOREDITCH CORPORATION.

Solicitors: *R. C. Ray; Broxholm & Williams; Donald S. Ball.*

G. A. S.

In re UNITED LONDON AND SCOTTISH INSURANCE COMPANY, LIMITED.

BROWN'S CLAIM.

C. A. 1915 *May* 5.

[00205 of 1912.]

Insurance (Accident) — Policy — Exceptions — Construction — Exception of Accident caused by (inter alia) "anything swallowed, or administered, or inhaled"—Construction limited by Context—Involuntary Inhalation of Gas.

An accident policy excepted liability in the case of death or disablement by accident caused (inter alia) "by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled":—

Held, that the context was not sufficient to confine the exception to voluntary inhalation; and that a death resulting from the accidental and involuntary inhalation of ordinary coal gas was within the exception.

Decision of Astbury J. [1915] W. N. 76 reversed.

By a personal accident and sickness policy dated June 25, 1910, the above-named company insured Brown against bodily injury by violent, accidental, external, and visible means.

If the injury within three calendar months from its occurrence was the sole and direct cause of the death of the assured the sum payable was 500*l.*

Condition 4 provided that "This policy does not insure against death or disablement (partial or otherwise) by accident, disease, or sickness where such accident, disease, or sickness is directly or indirectly caused to any extent by fits or faints, illness, or physical infirmity existing at the time of such accident, disease, or sickness, or following the same (except as the direct and usual result thereof unaided by any predisposition in the assured).

C. A. 1915 — UNITED LONDON AND SCOTTISH INSURANCE COMPANY, LIMITED, *In re.* BROWN'S CLAIM.

This policy also does not insure against death or disablement by accident directly or indirectly caused to any extent by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled; nor against injuries received while the assured is by intoxicating liquors, narcotics, drugs, or mental unsoundness (permanent or temporary) or otherwise rendered less capable than usual of taking care of himself."

On April 18, 1912, the assured met his death at a private house in Edinburgh during the subsistence of the policy. At the time of his death he was the sole occupant of the house. In consequence of his non-appearance on the morning of April 19 the house was entered and the assured was found dead in the lavatory with the gas turned on and unlighted.

The matter was reported to the police, but no inquiry was held by the sheriff. A post mortem examination was made by the assured's medical attendant, and the cause of death was certified as "suffocation from gas poisoning."

A claim was made by the executor of the assured, but on May 1, 1912, the company repudiated liability on the ground that the death resulted from the gas inhaled.

On June 18, 1912, the company was ordered to be wound up on a petition presented on June 5, 1912, and on July 22, 1912, the executor lodged a proof for 500*l.*

On November 18, 1914, the liquidator rejected the proof on the ground that the cause of death was not covered by the policy.

On December 8, 1914, the executor issued this summons for an order that the liquidator's decision might be reversed and the claim allowed in full.

Astbury J. held that having regard to the context the exception of anything "inhaled" pointed to an inhalation involving volition in the assured, e.g., by the voluntary inhalation of a gas believed to be harmless, but in fact deleterious, and did not include involuntary inhalation.

The liquidator appealed.

Leslie Scott, K.C., and *H. E. Wright*, for the appellant. This case is plainly excluded by condition 4, which expressly excepts

from the policy death or disablement caused by anything "inhaled." The case is within those words, and the only way the respondent attempts to get out of them is by reading the words as meaning "voluntarily inhaled." The word "voluntarily" is not there, and there is nothing in the context to justify its insertion.

A similar exception was held to be good in *Coles* v. *Accident Insurance Co.* (1) In *In re Bradley and Essex and Suffolk Accident Indemnity Society* (2) it was held that if there was an ambiguity in the policy it must be construed against the society, but *Coles* v. *Accident Insurance Co.* (1) is an authority that the Court must find the ambiguity in the policy. (3)

William Shakespeare, for the respondent. The whole of condition 4 is an exception from the general assurance against accidents of all accidents in which there is a voluntary element, either in the cause of the accident or in the assured exposing himself to special risks. The words "anything inhaled" must be governed by the context. If they were intended to be general, the usual and proper way of excluding such an accident would be death by poisoning.

LORD COZENS-HARDY, M.R. This is an appeal from a decision of Astbury J., who has admitted the claim of the legal personal representative of Mr. Brown under a policy of insurance against death by accident. The man met with his death in these circumstances. He was in a w.c., there was an escape of gas there, and he was asphyxiated. In other words, without intending to decide anything on the construction of the language of the policy, he inhaled the gas, which was the cause of his death.

The policy of insurance is one with regard to which I am tempted to use the language of Lord Esher in *Coles* v. *Accident Insurance Co.* (1), where he said: "I hold that this is a policy

(1) (1889) 5 Times L. R. 736.

(2) [1912] 1 K. B. 415, 422, 430.

(3) Three American cases—*Paul* v. *Travelers Insurance Co.* (1889) 112 N. Y. 472; 8 Am. St. Rep. 758; *Pickett* v. *Pacific Mutual Insurance* (1891) 144 Pa. St. 79; 27 Am. St. Rep. 618; and *M'Glother* v. *Provident Mutual Accident Co.* (1898) 89 Fed. Rep. 685—were also cited, but they were conflicting and the Court did not find them of any assistance.—J. R. B.

C. A. 1915

UNITED LONDON AND SCOTTISH INSURANCE COMPANY, LIMITED, *In re.* BROWN'S CLAIM,

Lord Cozens-Hardy M.R.

not to be praised, and people ought to be warned against insuring under policies in that form."

But the policy has to be construed, and having construed it, I come to the conclusion, not without regret, that I cannot take the view which Astbury J. did with regard to it.

The opening clause of the policy confines the insurance to "bodily injury by violent, accidental, external and visible means." It seems to me seriously open to doubt whether that does not exempt the company on every occasion which is likely to occur.

But happily it is not necessary to construe that clause. The question before us depends on condition 4, which contains these words: "This policy also does not insure against death or disablement by accident directly or indirectly caused to any extent by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled."

The learned judge has held that he is justified in saying that that applies only to intentional inhaling, such as a man taking anæsthetics before leaving himself in the hands of a dentist or before a surgical operation is performed. I regret that I cannot see any justification for that. In the case of *Coles* v. *Accident Insurance Co.* (1), to which I referred, the Court very reluctantly said that the language being clear you must give effect to it even though it might be very hard upon the assured. If, however, there is an ambiguity in the policy, remembering the rule that the words ought to be construed "contra proferentes," then it may be said that the company are liable because they have not clearly exempted themselves. I regret that I am unable to come to that view in this case. I think that the learned judge was probably influenced by the American decisions to which our attention has been drawn, but they are in direct conflict with each other and therefore afford us little assistance. The only English decision to which our attention has been called, namely, *Coles* v. *Accident Insurance Co.* (1), seems to me to be an authority clearly and distinctly in favour of the appellant in the present case. The result is that, not without regret, I think this appeal must be

(1) 5 Times L. R. 736.

allowed, and the claim of the legal personal representative of Brown must be rejected.

PICKFORD L.J. I agree, with the same regret, because I am not at all sure that this was a case which was contemplated when the condition was inserted in the policy. But that is not the question for us. The question is whether the words of the condition cover it. It seems to me very much in principle like the case to which we have been referred of *Coles* v. *Accident Insurance Co.* (1) The condition is expressed quite generally. [His Lordship read the condition.] In that case the words were "from poison." In some of the cases distinctions have been drawn between the expressions "from taking poison" and "from poison," and in some I think the distinction has been drawn between "inhaling" and "anything inhaled." I confess I think those distinctions are almost too fine to base anything upon, but if there is anything in them at all they are not in favour of the claimant in this case, because the words are "anything inhaled" and not "inhaling anything."

Without attaching any practical importance to those distinctions of words I look at the words in this condition and ask myself, "Did this man die from anything inhaled?" Undoubtedly he did, and in order to say that his legal personal representative is entitled to recover we should have to read the condition as meaning "anything voluntarily inhaled." Those are not the words of the condition. Therefore I agree that the claimant is not entitled to recover.

WARRINGTON L.J. I agree. The only duty which the Court has to perform is to determine whether the particular event is or is not covered by the policy. Assuming that the cause of this man's death was an injury occasioned by "violent, accidental, external and visible means," one has then to determine whether it comes within the limitation expressed in condition 4 upon the back of the policy. The man was found dead and his death was undoubtedly occasioned by the inhalation of poisonous gas. The limitation in condition 4 which is material is in these terms:

(1) 5 Times L. R. 736.

C. A.
1915
UNITED LONDON AND SCOTTISH INSURANCE COMPANY, LIMITED, *In re.* BROWN'S CLAIM.
Warrington L.J.

[His Lordship read the condition.] Was this death occasioned directly or indirectly to any extent by anything inhaled? It unquestionably was. The death was caused by noxious gas inhaled, but it is said we are not to read this clause in the policy literally, but we are to import from the context into it this limitation, that it is confined to death occasioned by something voluntarily inhaled, or something inhaled under circumstances which show that the assured voluntarily exposed himself to the danger of inhaling. I think it only requires to be stated to show how imposible it is to import any such limitation into the words of this condition. Directly you depart from the literal meaning of the words you embark upon a sea of difficulties and speculations which ought I think to be avoided. In my opinion the death in this case was occasioned by something inhaled. It is therefore within the limitations expressed in the condition and accordingly not an accident recoverable for under the policy.

LORD COZENS-HARDY M.R. The appeal is allowed with costs here and below.

Solicitors: *Wrensted, Hind & Roberts; Trower, Still, Parkin & Keeling, for Pike & Chapman, Galashiels.*

J. R. B.

In re HOUGHTON.
HOUGHTON *v.* HOUGHTON.

[1914 H. 2594.]

JOYCE J.

1915

April 13, 14; *May* 10.

Intestacy—Verdict of Inquest that Son murdered Intestate—Indictment for Murder—Insanity—Indictment not proceeded with—Right to share in Father's Estate—Trial of Lunatics Act, 1883 (46 & 47 *Vict. c.* 38), *s.* 2.

A coroner's inquisition having found that a man murdered his brother and father, he was tried and convicted on an indictment for the murder of the brother, but was found to be insane when he committed the act, and was ordered to be detained as a criminal lunatic. An indictment for the murder of the father was thereupon not proceeded with:—

Held, that he was not prevented from taking a share under his father's intestacy.

ADJOURNED SUMMONS.

On an inquisition taken at Whatton, in the county of Nottingham, on February 12 and, by adjournment, February 20, 1914, before the coroner as to the deaths of William Houghton and Jasper Arthur Houghton, a verdict was found that "William Houghton and Jasper Arthur Houghton were wilfully feloniously and with malice aforethought killed and slain at Whatton aforesaid by John Frederick Houghton" on February 10, 1914, against the peace of our Lord the King.

John Frederick Houghton was a son of William Houghton and elder brother of Jasper Arthur Houghton.

A certificate of the clerk of assize for the Midland Circuit stated that at the assizes at Nottingham on June 15, 1914, John Frederick Houghton was in due form of law tried and convicted upon an indictment for that he on February 10, 1914, did "feloniously wilfully and of his malice aforethought kill and murder" Jasper Arthur Houghton, but was insane at the time he committed the act, and it was therefore ordered that he be detained until His Majesty's pleasure be known.

At the same assizes John Frederick Houghton was indicted upon a similar indictment for the murder of William Houghton (who died immediately after Jasper Arthur Houghton), and a true

JOYCE J. 1915 HOUGHTON, *In re.* HOUGHTON *v.* HOUGHTON.

bill was found by the grand jury, but in view of the finding in the previous case the indictment was not proceeded with.

Jasper Arthur Houghton and William Houghton both died intestate.

This summons was taken out by the widow and administratrix of William Houghton for (inter alia) the determination of the question whether John Frederick Houghton was entitled as one of the statutory next of kin of William Houghton to a share in his personal estate or was precluded on the ground of public policy or otherwise from receiving a share.

Tomlin, K.C., and *Whitmore Richards*, for the plaintiff. Sect. 2 of the Trial of Lunatics Act, 1883 (1), has been considered by the House of Lords in *Felstead* v. *Rex* (2), where it was held that a special verdict under the Act, such as was given in this case, is a verdict of acquittal. (3) That differentiates this case and takes it out of the operation of the general principle according to which it is against public policy for a person who is guilty of feloniously killing another to take any benefit in that other person's estate. That principle is exemplified in *Fauntleroy's Case* (4), *Cleaver* v. *Mutual Reserve Fund Life Association* (5), and *In the Estate of Crippen* (6), and applies equally to a case of manslaughter as to one of murder: *In the Estate of Hall.* (7)

(1) Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2:—

"(1.) Where in any indictment . . . . any act . . . . is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done . . . , then, if it appears to the jury before whom such person is tried that he did the act . . . . charged, but was insane as aforesaid at the time when he did . . . . the same, the jury shall return a special verdict to the effect that the accused was guilty of the act . . . . charged against him, but was insane as aforesaid at the time when he did the act . . . .

"(2.) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known; . . . ."

(2) [1914] A. C. 534.

(3) See also *Rex* v. *Taylor*, decided since this case, and reported [1915] 2 K. B. 709.

(4) (1830) 4 Bli. (N.S.) 194.

(5) [1892] 1 Q. B. 147.

(6) [1911] P. 108.

(7) [1914] P. 1.

Ward Coldridge, K.C., and *Owen Thompson*, for William Houghton's father. The verdict of the coroner's jury is prima facie evidence that the son killed not only his brother but his father also: *Prince of Wales, &c. Association* v. *Palmer.* (1) Similarly an inquisition in lunacy is prima facie evidence of the lunacy: per Cozens-Hardy M.R. in *Hill* v. *Clifford* (2); *Harvey* v. *Rex.* (3)

In spite of the statutory verdict, this cannot be said to have been an innocent killing. It is against public policy that a guilty person should benefit by his own act and the Court will not take away any of the restraints operating on the mind of man against the commission of such a crime or act: *Fauntleroy's Case.* (4) "It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights": per Sir Samuel Evans P. in *In the Estate of Crippen* (5), referring to *Cleaver* v. *Mutual Reserve Fund Life Association.* (6) The principle is that "a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter": per Hamilton L.J. in *In the Estate of Hall.* (7) The sane human mind revolts at the very idea that a person of insane mind should be endowed with the fruits of his own crime, and in this case the Court is being asked to fructify a lunatic's scheme. The special verdict in this case "is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence": per Lord Reading C.J. in *Felstead* v. *Rex.* (8) In this case the lunatic has been found guilty of the act of killing his brother within the words of s. 2 of the Act, and with regard to his father there is prima facie evidence that he was guilty of the act of killing him also.

In the circumstances the lunatic cannot take any share under

(1) (1858) 25 Beav. 605.
(2) [1907] 2 Ch. 236, 244, 245.
(3) [1901] A. C. 601.
(4) 4 Bli. (N.S.) 194.
(5) [1911] P. 112.
(6) [1892] 1 Q. B. 147.
(7) [1914] P. 7.
(8) [1914] A. C. 542.

JOYCE J. 1915 HOUGHTON, *In re.* HOUGHTON *v.* HOUGHTON.

the intestacy, but drops out of the next of kin altogether: *Cleaver* v. *Mutual Reserve Fund Life Association.* (1)

Hughes, K.C., and *J. I. Stirling* (for *J. H. Boraston*, serving with His Majesty's Forces), for John Frederick Houghton. There is no real evidence upon which the Court can judicially determine that John Frederick Houghton did kill his father.

But, assuming that there is, the killing was not felonious, regard being had to the finding of the jury that he was insane at the time when he killed his brother only a few minutes before: *Felstead* v. *Rex.* (2) If there was no mens rea, the question of public policy drops.

It has been doubted whether the rule against a man profiting by slaying his benefactor applies at all to the case of intestacy. Distribution under the statute is imperative, the words used being "shall distribute" without any exception or limitation. It has not been decided in England, but it has been in Pennsylvania, that the rule does not apply: *Carpenter's Estate.* (3) The point, if it were to be argued, would give rise to the question whether a rule of public policy can override an express statutory provision.

Hay v. *Tower Division Justices* (4) shows that a free pardon puts a man in the same position as to status as he was in before conviction. It takes away the crime and puts him in the same position as if it had not been committed.

Cur. adv. vult.

May 10. JOYCE J. read the following judgment:—Since the abolition of forfeiture for felony—before which, so far as I am aware, no such question as I have now to consider had ever arisen—it has been settled that, where a person is criminally responsible for the death, the felonious slaying, of another, whether the crime be murder or manslaughter, he cannot take anything under the will of the deceased. Hitherto it has never been suggested that there is any such incapacity or disqualification where the person guilty of the act of slaying the deceased was innocent of any crime, as where the deceased was killed accidentally or by misadventure, or his death was held to be a case of justifiable homicide.

(1) [1892] 1 Q. B. 147.
(2) [1914] A. C. 534.
(3) (1895) 50 Am. St. Rep. 765.
(4) (1890) 24 Q. B. D. 561.

Here it is alleged that the defendant, John Frederick Houghton, slew his father, William Houghton, but no one saw the deed; and I doubt whether there is any evidence before me upon which I could judicially arrive at the conclusion that the defendant, John Frederick Houghton, who is, or at all events at the time of his father's death was, of unsound mind, was guilty of the murder of his father, or of manslaughter. This Court has no jurisdiction to try him, although—as is stated in Mr. J. Chadwick's article in the *Law Quarterly Review* for April, 1914, vol. xxx. p. 211—it is not a necessary condition to the application of the disqualifying rule that there should be any conviction. Not infrequently a murderer commits suicide immediately afterwards, or he may die a natural death before trial or verdict.

It has not been determined, or, so far as I am aware, judicially considered, in this country whether a murderer can take a distributive share under the intestacy of his victim. In America I believe there are conflicting decisions upon the point. In the case of *Carpenter's Estate* (1) the judge is reported as having said this: "The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says if there is a son he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relatives shall take who have no right to take it if there is a son? From what source is it possible to derive such a power in the court? It is argued that the son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments; the courts can only enforce them. In this state, no such punishment as this is fixed by any law, and therefore the courts cannot impose it. It is argued, however, that it would be contrary to public policy to

(1) 50 Am. St. Rep. 765, 766, 767.

JOYCE J. 1915 HOUGHTON, *In re.* HOUGHTON *v.* HOUGHTON.

allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained, when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion, when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that, upon the death of a person, his estate shall vest in his children, in the absence of a will,"—that is not quite literally the case in this country—"how can any doctrine, or principle, or other thing called public policy, take away the estate of a child, and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory, and the estate cannot be diverted from those persons and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute." That seems to me, if I may say so, very cogent reasoning on this subject.

In the present case the unfortunate victim, the father, died intestate. But one thing is, I think, quite certain, namely, that, if the indictment against the defendant, John Frederick Houghton, for the murder of his father had been proceeded with, and it had been proved that he did in fact slay his father, he would have had to be dealt with under s. 2 of the Trial of Lunatics Act, 1883. So that, whatever be precisely the proper form of the verdict to be taken in such circumstances, if he had been found guilty of the act, he would not have been found guilty of any offence. In other words, having regard to the decision in *Felstead* v. *Rex* (1), the defendant, John Frederick Houghton, if actually tried, would have been acquitted of any criminal offence, even if found guilty of the act of killing his father.

Consequently I can see no reason why he should not have taken any benefit under the will of his father if the deceased had left a will. There is still less reason, if possible, why he should not take his proper share under the intestacy of his father, the distribution of whose property is regulated by the positive provisions of the statute law. It will be enough, I think, to say, in answer

(1) [1914] A. C. 534.

to the questions asked by the summons, that the executors may be at liberty to distribute the estate, giving him his distributive share, according to the statute.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Oldham & Marsh, Melton Mowbray; Stileman & Neate, for Latham, New & Smyth, Melton Mowbray.*

A. L.

In re SNAPE. ELAM *v.* PHILLIPS.

[1915 S. 523.]

Will—Construction—Settled Legacy—"Free of all duty"—Estate Duty—Legacy Duty—New Duty imposed by Statute after Death of Testatrix—Incidence of Duties as between Settled Legacy and General Estate—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-ss.* 1, 2—*Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

By a codicil to her will made in July, 1911, a testatrix bequeathed to her trustees the sum of 6000*l.* "free of all duty," to be held upon trust for her niece, D. H., for life, and after her death for her children, with a gift over to certain charitable institutions in the event of no child of the niece attaining a vested interest. At the respective dates of the will and codicil and of the death of the testatrix in January, 1913, this settled legacy was, by virtue of the Finance Act, 1894, relieved from the payment of estate duty on the death of the niece; but by s. 14 of the Finance Act, 1914, which came into operation on July 31, 1914, this relief was abolished in the case of any person dying after August 15, 1914. The niece was still living and a spinster, and estate duty would be payable on her death, as well as legacy duty. Upon a summons by the trustees of the settled legacy asking whether they ought to set aside, out of the assets of the testatrix, any sums to meet the estate duty and the legacy duty, or whether both or either were payable out of the legacy:—

Held, on the question of construction of the gift "free of all duty," that the legacy duty was payable out of the general estate, according to *In re Turnbull* [1905] 1 Ch. 726.

But *held*, that the operation of the gift must be determined, with reference to the duties imposed in respect of the legacy, at the date of the death, and ought not to be extended to duties imposed by the Legislature subsequent to that date, and the estate duty was accordingly payable out of the legacy, and not out of the general estate.

ADJOURNED SUMMONS.

By her will dated June 30, 1909, Mary Constance Snape

EVE J.
1915
SNAPE, *In re.* ELAM *v.* PHILLIPS.

appointed the plaintiffs executors and trustees, and gave divers pecuniary legacies including one of 3000*l.* free of duty to the first defendant, Fanny Furlong Phillips, and another of 3000*l.* to the second defendant, Lily Laura Laxton. By clause 5 of her will the testatrix bequeathed to her trustees "the sum of 10,000*l.* free of all duty" to be held by them upon certain trusts for the benefit of her niece, Dorothy Hahn, during her life, and after her death upon trust for her children as therein mentioned, and if no child should attain a vested interest in the said legacy the same was to fall into and form part of the residuary estate. The residuary estate, after payment of debts and the legacies and annuities given by her will, was given to specified charities and institutions. By clause 12 of her will the testatrix declared that certain legacies therein mentioned (which included the two legacies of 3000*l.* each to the two defendants and the trust legacy of 10,000*l.* for the benefit of Dorothy Hahn) should be payable only subject to and after payment of all legacies of money and annuities and the duties thereon, thereinbefore or by any codicil thereto bequeathed, and she also declared that the legacies specifically referred to in that paragraph of her will should, if necessary, abate proportionately. By a first codicil to her will dated July 27, 1911, the testatrix revoked the bequest of 10,000*l.* in favour of her niece Dorothy Hahn, and in lieu thereof bequeathed to her trustees "the sum of 6000*l.* (free of all duty)" to be held by them upon the like trusts for the benefit successively of her niece and children, with an ultimate gift, in the event of no child of the niece attaining a vested interest, to certain charitable institutions, of which the third defendant, the Royal Society for the Prevention of Cruelty to Animals, was one. By a second codicil to her will the testatrix reduced the legacy to L. L. Laxton from 3000*l.* to 2000*l.* The testatrix died on January 22, 1913. The residuary estate proved insufficient to pay in full all the legacies bequeathed by the will and codicils, and in this event, according to the true construction of the will, as determined by an order of Warrington J. dated May 6, 1914, the legacies of 3000*l.* and 2000*l.* respectively bequeathed to the respondents other than the charity had to abate proportionately. Since the date of this order the Finance Act, 1914, had come into operation, and under s. 14 of

that Act estate duty, from which the legacy was exempted by s. 5, sub-s. 2, of the Finance Act, 1894, would, on the death of Dorothy Hahn, become payable in respect of her legacy as well as legacy duty. The latter duty had only been paid in respect of her life interest in the legacy. Dorothy Hahn was still living and a spinster. Part payment of the two legacies of 3000*l.* and 2000*l.* had been made by the plaintiffs, and they had a sum of 1200*l.* in their hands available, but desired the protection of the Court before making any further distribution. Accordingly, on February 17, 1915, an originating summons was issued by the plaintiffs as trustees of the settled legacy of 6000*l.* to have it determined whether, having regard to the bequest in the first codicil of the sum of 6000*l.* "free of all duty," the plaintiffs ought to set aside any and what sums out of the assets of the testatrix remaining unadministered, to meet (*a*) the estate duty, and (*b*) the legacy duty which would become payable in respect of the said legacy on the death of Dorothy Hahn, or whether both or either of the said duties would be payable out of the said legacy. The respondents to the summons were Fanny Furlong Phillips, Lily Laura Laxton, and the Royal Society for the Prevention of Cruelty to Animals.

C. W. Turner, for the trustees of the will.

Owen Thompson, for the legatee of 3000*l.* On the point of construction of the will, the meaning of the words "free of all duty" must be free of all duty as between the trustees of the legacy and the estate, and must refer only to the duties payable at the time of the death of the testatrix. Legacy duty has been paid, so far as it was due, as between the estate and the trustees.

As to the estate duty, the effect of s. 14 of the Finance Act, 1914 (1), put an end to the exemption from this duty given by

(1) The Finance Act, 1914, s. 14, provides as follows: "Any relief from the payment of estate duty given by sub-section (2) of section five, or by sub-section (1) of section twenty-one of the Finance Act, 1894 (which relate to settled property), or by sub-section (16) of section twenty-three of that Act (which relates to entailed estates in Scotland) shall cease in the case of any person dying after the fifteenth day of August nineteen hundred and fourteen, and settlement estate duty shall not be levied in the case of persons dying after the eleventh day of May, nineteen hundred and fourteen."

EVE J.
1915
SNAPE, *In re.* ELAM *v.* PHILLIPS.

s. 5, sub-ss. 1 and 2, of the Finance Act, 1894: Austen-Cartmell's Finance Acts, 1894—1910, 5th ed. pp. 56, 170. An increased duty is now imposed. This is new legislation as to which there is no direct decision, and it must be determined upon first principles. The effect will be serious if it is held that all new duties imposed after the death of a testator in such a case as the present must be paid out of the general estate. The residue has not all been distributed in the present case, but it might well have been, and to decide that future duties must come out of the general residue would have the effect of tying up the distribution of estates. It would also have the effect of varying the provisions made by this will, and would make subsequent legislation operate retrospectively. Trustees would always have to provide for possible future duties imposed by the Legislature. There have been analogous decisions under the Apportionment Act, 1870: *Jones* v. *Ogle* (1), *Hasluck* v. *Pedley* (2), and *Constable* v. *Constable* (3); under the Married Women's Property Act, 1882: *In re March* (4); under the Mortmain Act, 1891: *In re Bridger* (5); under the Customs and Inland Revenue Act, 1888: *In re Rayer* (6); and under the Finance Acts: *In re Turnbull.* (7) The principle of these cases is that legislation subsequent to the date of the will cannot affect the meaning and construction of the gift, but only alters its legal operation. I submit that the legacy and estate duty must come out of the legacy.

J. R. Brooke, for the second defendant, a legatee for 2000*l.*

L. Mossop, for the Royal Society for the Prevention of Cruelty to Animals. It is a question of intention. The testatrix intended the legacy to be handed over to the legatee intact. The tax itself has not been removed, only the exemption from it provided by the Finance Act, 1914. It was intended that all duties now or hereafter to be imposed should be paid, so that the legatee would get the full legacy of 6000*l.* This estate duty is therefore payable out of the general residue.

(1) (1872) L. R. 14 Eq. 419; L. R. 8 Ch. 192.
(2) (1874) L. R. 19 Eq. 271, 273.
(3) (1879) 11 Ch. D. 681.
(4) (1884) 27 Ch. D. 166.
(5) [1894] 1 Ch. 297.
(6) [1903] 1 Ch. 685.
(7) [1905] 1 Ch. 726.

EVE J., after stating the facts, continued: The question as to the legacy duty turns on the true construction of the phrase "free of all duty," that is to say, on the construction of the gift; that as to the estate duty depends on whether the legal operation of the phrase is to be ascertained at the date of the death of the testatrix, or at some subsequent date—in this case the death of the niece.

On the question of construction, I think the legacy duty is clearly payable out of the general estate. The observations of Farwell J. in *In re Turnbull* (1) are, I think, exactly in point. He says: "Then I find the testatrix giving this settled legacy 'free from duty.' I do not see how I can spell out of that anything other than what it says, namely, that the legacy is to be paid free from duty. The settlement estate duty is charged upon the legacy, no doubt, in a sense, but the executors have to pay it before they pay over the legacy, and they do so as a matter of practice. Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy. I cannot myself see any reason for saying that 'free from duty' means free from one kind of duty payable by the executors more than from another kind of duty so payable. If the executors have to pay the duty before they hand over the legacy, they cannot pay over that legacy free from duty unless they have first discharged the duty out of the general estate. If they pay it over less the duty, then they pay over less than they are directed to pay. If they have to pay it over subject to duty, and if the property is charged with the duty, they only pay over the balance after payment of duty. I can see no means by which I can restrict the generality of the word 'duty.'"

I adopt the same views with respect to the gift here, and the more readily when I recall that it is only the fact that the rates of duty payable on the legacy in respect of the interests for life and in remainder are not identical, which prevents the whole duty being paid once and for all.

The point as to the estate duty presents more difficulty, and has not so far, as I am informed, been the subject of any direct decision.

At the respective dates when the testatrix made her will and

(1) [1905] 1 Ch. 726, 732, 733.

EVE J. 1915 SNAPE, *In re.* ELAM *v.* PHILLIPS.

codicils and died, and for more than eighteen months after the last mentioned date, the settled legacy was by virtue of the Finance Act, 1894, exempt or relieved from the payment of estate duty on the death of the niece, but by s. 14 of the Finance Act, 1914,—which came into operation on July 31, 1914,—it is enacted that this relief shall cease in the case of any person dying after August 15, 1914, and as the niece is still living, estate duty will now be payable on her death.

The authorities cited by Mr. Owen Thompson establish this, that had the Act I have just referred to become law between the date of her last codicil and the death of the testatrix, the operation of the gift, as I have construed it, would have extended to throw the burden of this duty on the general estate; but they go no further, and it is material to examine the ground upon which they went as far as they did. Put shortly, it is this, that although legislation subsequent to the date of the testamentary disposition cannot alter the construction of the gift, it may operate to enlarge its application, and in determining what is the scope, extent, or application of the gift, regard is to be had to the moment when the testamentary disposition comes into operation, not to its date. On this principle a gift "free of all duty" can properly be extended so as to include new duties imposed between will and death.

But the principle, as it appears to me, has no application and ought not to be extended so as to be made applicable to a case where a new duty has been imposed, or, what is the same thing, an exemption has been abolished after the date when the will comes into operation.

Apart from the consideration—a very material one—that so to apply it might, in effect, make the subsequent legislation in some cases retrospective, difficulties of a very serious nature at once present themselves in any attempt to give practical effect to such application.

The logical conclusion of the argument put forward here on behalf of the charity is that the general estate must discharge all duties which may be imposed on, or in respect of, the legacy, at any time prior to its being paid over to those who can give a discharge for it.

Who is there who can say to-day at what rate the existing duty will be assessable on the life tenant's estate at her death; still less, who can foretell at what rate and upon what basis the duty may be leviable when the life interest falls in, or what new duties between now and then the exigencies of a depleted exchequer may see added to the tale which already makes death the most extravagant episode in a man's career?

And in all this uncertainty is the whole general estate to be retained undistributed until the legacy comes home, and if not the whole, then how much?

Again, what is to happen in cases where all existing duties having been paid, and the estate having been distributed, new duties are subsequently—it may be long subsequently—imposed? Is the general estate in the hands of the beneficiaries to be made liable for such new duties, and if so how?

These considerations appear to me to afford sufficient reasons for holding that the application or operation of such a gift as we have in this case must be determined with reference to the duties imposed on or in respect of the legacy at the date of the death, and ought not to be extended to duties created or imposed by legislation subsequent to that date.

Accordingly, I hold that the estate duty referred to in the summons will be payable out of the legacy, and not out of the general estate.

The costs of all parties, as between solicitor and client, must be taxed and paid, and retained out of the general estate.

Solicitors: *Johnson, Raymond-Barker & Co.; Braikenridge & Edwards, for Swayne, Havers & Harfield, Southampton; W. H. & A. G. Herbert; Sydney G. Polhill.*

G. M.

SARGANT J. 1915 *April* 13, 14, 15.

BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED.

[1915 B. 934.]

Company—Contract by which a Shareholder has Power to nominate a Director —Article of Association to same Effect—Power of Company to alter Article —Specific Performance—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

By an agreement binding on the defendant company it was provided that so long as the plaintiff syndicate should hold 5000 shares in the defendant company the plaintiff syndicate should have the right of nominating two directors on the board of the defendant company. A clause to the same effect was contained in article 88 of the defendant company's articles of association. Another article provided that the number of directors should not be less than three nor more than seven. The plaintiff syndicate had recently nominated two persons as directors. The defendant company objected to these persons as directors and refused to accept the nomination, and a meeting of the shareholders was called for the purpose of passing a special resolution under the Companies (Consolidation) Act, 1908, s. 13, cancelling article 88:—

Held, that the defendant company had no power to alter its articles of association for the purpose of committing a breach of contract and that an injunction ought to be granted to restrain the holding of the meeting for that purpose.

Allen v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 followed and applied.

Punt v. *Symons & Co.* [1903] 2 Ch. 506 treated as overruled by *Baily* v. *British Equitable Assurance Co.* [1904] 1 Ch. 374.

Held, also, that the contract was not incapable of being specifically enforced, and that a declaration ought to be made that the two persons nominated by the plaintiff syndicate became and were directors of the defendant company with ancillary relief by way of injunction if it became necessary.

Bainbridge v. *Smith* (1889) 41 Ch. D. 462 distinguished.

WITNESS ACTION.

The defendant company was incorporated under the Companies (Consolidation) Act, 1908, in 1910 under the name of the Crude Rubber Washing Company, Limited, since changed to the Alperton Rubber Company, Limited.

By an agreement dated March 24, 1910, made between the plaintiff syndicate of the one part and a trustee for the defendant

company of the other part (which had been adopted by and become binding upon the defendant company), the plaintiff syndicate and M. M. Dessau agreed to sell and the defendant company agreed to buy certain patent rights and the goodwill of a business in consideration of cash and shares in the defendant company, and by clause 10 of the agreement it was provided that so long as the plaintiff syndicate should hold at least 5000 shares in the capital of the defendant company the plaintiff syndicate should have the right of nominating two directors on the board of the defendant company, such directors to obtain their qualifications within one month of appointment.

The articles of association of the defendant company provided as follows :—

88. "The British Murac Syndicate, Limited, so long as it holds at least 5000 shares in the capital of the company shall have the right of nominating two directors on the board of the company, and the directors so nominated shall not be subject to the provisions of articles 95, 96 and 101 hereof."

89. ". . . . Unless otherwise determined by a general meeting, the number of directors shall not be less than three nor more than seven."

90. "The directors shall have power from time to time, and at any time, to appoint any other persons to be directors but so that the total number of directors shall not at any time exceed the maximum number fixed above, and so that no appointment under this clause shall have effect unless all the directors for the time being concur therein. The continuing directors may act notwithstanding any vacancies in their body."

95. "At the ordinary meeting to be held in the year 1912 and at every succeeding ordinary meeting, but subject to the provisions of article 88 hereof, one third or the nearest number to but not exceeding one third of the directors (other than the managing director) shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected."

96. "Subject to the provisions of article 88 hereof the directors to retire at the ordinary meeting to be held in the year 1912

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

shall, unless the directors agree among themselves, be determined by lot, but in every subsequent year the one third or nearest number of the directors who have been longest in office shall retire. As between two or more who have been in office an equal length of time the directors to retire shall, in default of agreement between them, be determined by lot."

100. "The company may by extraordinary resolution remove any director before the expiration of his period of office and may by ordinary resolution appoint another qualified person in his stead."

101. "Subject to the provisions of article 88 hereof no person not being a retiring director shall unless recommended by the directors for election be eligible for election to the office of director at any general meeting unless he or some other member intending to propose him has at least seven clear days before the meeting left at the office of the company a notice in writing under his hand signifying his candidature for the office or the intention of such member to propose him."

By an indenture dated May 26, 1910, the patent rights in question were assigned to the defendant company and the purchase price was paid and satisfied.

In the year 1910 two directors were appointed by the plaintiff syndicate, but they both ceased to be directors in 1911.

At its commencement the defendant company incurred heavy losses, the patents assigned to the company proving of little if any value, but the company, instead of further working these patents, had turned its attention to rubber manufacture, and Mr. Dessau, who had occupied the position of manager and technical adviser to the company, resigned his position of manager.

During the year 1914 the plaintiff syndicate exercised its right of nomination by appointing one director only, a Dr. Thomson, who worked in harmony with the other directors, but he retired towards the end of the same year.

In the same year a difference of opinion arose on the board whether the defendant company should continue its manufacturing business as its sole business or whether it should take up a new patent of Mr. Dessau, and towards the close of the

year the plaintiff syndicate nominated Mr. Dessau as one of its nominees on the board of directors. Objection, however, being taken to this nomination, the plaintiff syndicate did not press it, but on March 13, 1915, nominated the same Dr. Thomson and one Thomas Warwick, who was engaged in or connected with the manufacture of rubber goods.

The defendant company refused to accept the nomination of these two persons, and in accordance with the requisition of a shareholder the directors called a meeting of the company to be held on March 23, 1915, for the purpose of passing a special resolution under s. 13 of the Companies (Consolidation) Act, 1908, cancelling article 88 of the company's articles of association. In the circular which accompanied the formal notice of the meeting the directors, after giving some account of the history of the company, said: "It is most detrimental to the business of this company to be under the necessity of appointing two additional directors nominated at any time by the British Murac Syndicate who may seek to alter the settled policy of the company . . . . Your directors feel strongly that the general body of shareholders should have the sole right of appointing their directors." The preliminary meeting had been already held and the resolution carried. The confirmatory meeting had not yet been held.

On March 16, 1915, the plaintiff syndicate and the two persons nominated by it brought this action against the defendant company and the other directors, claiming by their statement of claim (1.) a declaration that under and by virtue of the nomination aforesaid the two persons so nominated became and were directors of the defendant company; (2.) an injunction to restrain the defendants from preventing them from so acting; (3.) specific performance of the agreement of March 24, 1910; and (4.) an injunction to restrain the defendants from summoning and holding a meeting or meetings of the defendant company for the purpose or with the object of passing a special resolution altering the articles of the defendant company so as to deprive or purport to deprive the plaintiff syndicate of its right to nominate two directors of the defendant company in accordance with the said agreement.

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

Gore-Browne, K.C., and *F. Whinney*, for the plaintiffs. The plaintiffs are entitled to the relief claimed. The defendant company has no power to alter its articles of association for the purpose of committing a breach of the contract contained as well in the agreement of March 24, 1910, as in the articles of association: *Allen* v. *Gold Reefs of West Africa* (1); per Rigby L.J. in *James* v. *Buena Ventura Nitrate Grounds Syndicate*. (2) The two persons became directors immediately on their nomination by the plaintiff syndicate.

A. Grant, K.C., and *E. J. Heckscher*, for the defendants. First, the claim so far as it seeks to restrain the defendant company from altering its articles of association is ill-founded. A company has no power to contract itself out of its inherent statutory power to alter its articles conferred by s. 13 of the Companies (Consolidation) Act, 1908: Buckley on Companies, 9th ed. p. 22. The company can cancel article 88 notwithstanding that such cancellation may not get rid of the outside obligation imposed by clause 10 of the agreement of March 24, 1910. It is submitted, however, that the remedy for the breach of that agreement would lie in damages only. There is no case in which a company has been restrained by injunction from exercising its statutory power of altering its articles, and the decision of Byrne J. in *Punt* v. *Symons & Co.* (3) is a direct authority against granting such an injunction as is claimed by paragraph 4 of the claim. That case is said not to have been followed by the Court of Appeal in *Baily* v. *British Equitable Assurance Co.* (4), but the decision of the Court of Appeal was itself reversed by the House of Lords, though on another point: *British Equitable Assurance Co.* v. *Baily*. (5) The proposition for which we contend is further supported by *Walker* v. *London Tramways Co.* (6); *Allen* v. *Gold Reefs of West Africa* (1); *Malleson* v. *National Insurance and Guarantee Corporation* (7); *Andrews* v. *Gas Meter Co.* (8)

Secondly, it is a well-settled principle that the Court will not

(1) [1900] 1 Ch. 656.
(2) [1896] 1 Ch. 456, 466.
(3) [1903] 2 Ch. 506.
(4) [1904] 1 Ch. 374.
(5) [1906] A. C. 35.
(6) (1879) 12 Ch. D. 705.
(7) [1894] 1 Ch. 200.
(8) [1897] 1 Ch. 361.

enforce specific performance of a contract for service: Fry on Specific Performance, 4th ed. p. 47; and this rule is applicable to the case of a director of a limited company: *Bainbridge* v. *Smith.* (1) Article 100 of the company's articles of association affords an additional argument against specific performance, since under that article the company could at once proceed to remove these directors. A director is a general agent of the company and no person can be compelled to accept an agent against his will. Moreover there are in the present case substantial personal objections to these two persons, especially to Mr. Warwick.

There is a further point whether the nomination by the plaintiff syndicate either by virtue of the agreement or by virtue of the articles constitutes these persons as directors. We submit that the mere nomination is insufficient and that a further act of election by the other directors or by the shareholders is requisite.

We also submit that having regard to the worthlessness of the patents there has been a total or partial failure of consideration which prevents the Court from enforcing specific performance of the agreement. [They also cited Buckley on Companies, 9th ed. p. 642; *Isle of Wight Ry. Co.* v. *Tahourdin* (2); *Cannon* v. *Trask* (3); *Baillie* v. *Oriental Telephone and Electric Co.* (4)]

Gore-Browne, K.C., in reply, in answer to a suggestion by the Court, stated that the plaintiffs would be content to take liberty to apply for the injunction claimed in paragraph 2 of the claim so as to leave any question as to personal fitness open until after a meeting of the shareholders had been called, and was not further called upon.

SARGANT J. This is an action of a somewhat unusual character. [His Lordship stated the nature of the action and the facts of the case, reading clause 10 of the agreement and article 88 of the articles of association and the passage above set out from the circular issued by the directors of the defendant company, and continued:]

(1) 41 Ch. D. 462.
(2) (1883) 25 Ch. D. 320, 333, per Lindley L.J.
(3) (1875) L. R. 20 Eq. 669.
(4) [1915] 1 Ch. 503.

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

I will first deal with two points which are rather in the nature of preliminary objections to the action. In the first place Mr. Grant attempted to make out that the case was one of specific performance and that there had been a total or partial failure of consideration on the part of the plaintiff syndicate, and that in view of the large losses which had been sustained by the defendant company in its early operations and the entire worthlessness of the patents made over to the company there was no case for specific performance. The answer to that suggestion is that the question here is one of the specific enforcement of an obligation contained in an agreement which has itself been performed, and not one of carrying out an executory agreement, so that the ordinary rules relating to specific performance do not really apply. It is a mere question of enforcing a subsisting obligation, the executory agreement having been already carried out by the assignment of the patents. Under these circumstances it would be perfectly impossible to treat the obligation as at an end, unless possibly a clear and manifest case of fraud were made out on behalf of the defendant company, and no attempt has been made to establish any such case. It is observable too that, some time after all the facts were known to the defendant company, the company determined not to give up the patents, as appears quite clearly from a letter or minute of their board on July 22, 1913. So far, therefore, there is no ground at all to induce me to hold my hand.

The second preliminary point was that under article 88 itself in order to complete the appointment of the two directors something further had to be done beyond their mere nomination by the plaintiff syndicate. In my opinion that is not so. According to the true reading of the article I think that when the syndicate formally nominated the persons whom it selected those persons became directors then and there. It was suggested that some form of co-option on the part of the other directors was necessary. I do not think so, but in any case that step would be a mere formality, and the right of the plaintiff syndicate to choose the two directors seems to me to be perfectly clear.

I now turn to the two main objections taken on behalf of the defendants, which as I understand them are these: first, that

the defendant company cannot contract itself out of its inherent statutory power to alter its articles of association, and, secondly, that the contract in question is in the nature of a contract of service and it would be contrary to the practice of the Court to enforce specific performance.

With regard to the first point, it appears to me to have little substance in it for this reason. As I understood Mr. Grant's argument he did not contend that the alteration of the articles of association by striking out article 88 would in fact get rid of the right of the plaintiff syndicate to nominate the two directors or of the obligation of the defendant company to accept the directors so nominated; but on the contrary he accepted the view that that right and obligation would subsist, and that, although the article was cancelled, the plaintiff syndicate would still be at liberty, by virtue of its contractual rights under the agreement, to nominate two directors and the defendant company would still be bound to accept them, apart of course from the second objection with which I will deal presently. But, however unsubstantial the point may be, yet it is argued that the cancellation of the article will at any rate get rid of one of the two fetters on the company—meaning the power to compel it to comply with its obligations—and I must deal with the argument which has been addressed to me. The principal authority on the subject is *Allen* v. *Gold Reefs of West Africa* (1), where the Court clearly recognized that a company cannot alter its articles so as to commit a breach of contract, and further that even the articles themselves might show that there was such a contract as that it would be unfair on the part of the company to alter them. Here I have not to consider the latter point because there are present here both the provision in the articles and the express obligation in the agreement under which the plaintiff syndicate is to have this express right. In the present case I think that the most important part of the reasons in *Allen* v. *Gold Reefs of West Africa* (1) is to be found in the following paragraph in the judgment of Lindley M.R., where he says (2): " But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in

(1) [1900] 1 Ch. 656. (2) [1900] 1 Ch. 673.

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." That passage clearly recognizes that if the Court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty to alter that article so as to break that contract. In my judgment on the facts of this case the contract between the plaintiff syndicate and the defendant company clearly involved as one of its terms that article 88 was not to be altered, that is that the plaintiff syndicate so long as it held the stipulated number of shares was to have a perpetual right of nominating two directors of the company.

It has been said, and I think rightly said, that *Punt* v. *Symons & Co.* (1) is an express authority in favour of the defendants' contention, but so far as this point is concerned *Punt* v. *Symons & Co.* (1) seems to me to have been overruled by *Baily* v. *British Equitable Assurance Co.* (2) In that case the Court of Appeal in the view which they took of the facts of the case considered that there was a contract between the company and the policy-holders of the company that the full profits should be applied in declaring bonuses on the policies of the various holders, and held that the company was prevented from altering its articles so as to provide that a certain portion of the profits should be carried to a reserve fund in breach of that contract. Although that decision of the Court of Appeal was reversed by the House of Lords, it is clear to me that it was not reversed owing to any dissent on the part of the House of Lords from the principle enunciated by the Court of Appeal. Indeed the learned Lords in their speeches seem to me to have recognized that principle. All that the House of Lords decided was that on the true interpretation of the bargain between the policy-holders and the

(1) [1903] 2 Ch. 506. (2) [1904] 1 Ch. 374.

company there was in fact no contract between them that the allocation of the whole of the profits to the policies by way of bonus should be a perpetual arrangement. The decision of the Court of Appeal therefore seems to me to be a clear authority for the proposition that a company may be restrained by injunction from altering its articles of association for the purpose of committing a breach of a definite contract one of the terms of which is that the articles shall not be altered.

I now turn to the second objection, namely, that the contract under which the plaintiff syndicate is to have the right of appointing two directors is in the nature of a contract of service, and accordingly is one which, on the ordinary principles relating to that class of contracts, the Court will not specifically enforce so as to compel one person to accept another as his servant. I feel great doubt whether the relation between a company and a director is in the nature of a contract of service within the meaning of that doctrine. It appears quite clearly from *Automatic Self-Cleansing Filter Co.* v. *Cuninghame* (1) that directors may have rights and powers and duties under the constitution of the company independently of the direction of a majority of the shareholders, that is to say, that to some extent at least they may occupy an independent position. It is true that in *Bainbridge* v. *Smith* (2) the Court of Appeal declined to grant an injunction to force a certain person on a company as its managing director in spite of the existence of a contract to that effect, but apart from other reasons for that decision a managing director is to some extent in a different position from that of an ordinary director because he is half director and half manager. And further the question which I am considering at the moment is not the question whether a particular man shall be forced upon an unwilling company, but whether there is a general right on the part of the plaintiff syndicate to nominate persons who shall be directors of the defendant company. That which the defendant company is trying to do is to get rid altogether of a general right of nomination and not merely to object to receive in the capacity of director a particular individual. It is familiar knowledge that agreements of this kind, under which

(1) [1906] 2 Ch. 34. (2) 41 Ch. D. 462.

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

debenture-holders or preference shareholders or other persons who have a permanent stake in a company have a right to appoint one or more directors of the company for the purpose of protecting their interests, are exceedingly common. It is also obvious that merely to award damages for the breach of such an agreement would be a wholly inadequate and illusory remedy. Accordingly I am not going to be the first to hold that an agreement for good consideration, under which a shareholder in a company, while he continues to hold his shares or a certain number of them, shall in virtue of that holding have the right of appointing or nominating a director of the company, is one that cannot be enforced by the injunction of this Court. In my opinion the right is one which ought to be so enforced, and the enforcement of which by way of declaration or injunction is not in conflict with the ordinary rules against the specific performance of contracts relating to service. It is not as if the plaintiff syndicate had a power of nominating an absolute majority of the board of directors. To a contract of that kind there might possibly be objections inasmuch as it would be putting the control of the company in the power of an outsider, but that is not the case with which I have to deal. In the present case the nomination of two directors by the plaintiff syndicate only secures the presence of some person or persons—not constituting a majority—on the board of directors in order that the views advocated by the plaintiff syndicate may be represented and find expression on the board. That being so, I ought to accede to the claim of the plaintiffs by declaring that by virtue of the nomination made by the plaintiff syndicate Dr. Thomson and Mr. Warwick, the two persons nominated, have become and are directors of the defendant company, and I ought also to grant an injunction to restrain the holding of the confirmatory meeting for the purpose of getting rid of article 88 of the articles of association of the company.

I have next to consider the question of granting an injunction to compel the acceptance of Dr. Thomson and Mr. Warwick as members of the board. I think it is clear that, although an outside body like the plaintiff syndicate in the present case may have the power of nominating two directors on the board, the Court would not by injunction force the company to accept on its board

persons who were unfit or thoroughly unacceptable as members of the board of directors. So far as unacceptability in the present case merely means that the persons nominated are persons who might be in sympathy with the general policy of Mr. Dessau, that of itself would not in my judgment be a proper reason for objection on the part of the company or the other directors; but certain personal reasons have been stated with which I must deal.

[His Lordship said that as regarded Dr. Thomson he saw no possible personal objection, but as regarded Mr. Warwick, whose business was in competition, if not with that of the company, still with that of a great number of customers of the company, he thought that there might be reasonable objections raised against him in that capacity and possibly in other capacities. His Lordship, therefore, while making a declaration as claimed did not propose to grant an immediate injunction in support of it, but to wait as was done in the case of *Bainbridge* v. *Smith* (1) and see whether the shareholders of the company, who up to the present had only been trying to get rid of the general obligation towards the plaintiff syndicate, thought it worth while to have a meeting called and to object on personal grounds to the appointment of Mr. Warwick. He proposed, therefore, to give liberty to apply for an injunction generally without embodying in that liberty any special directions or indications. His Lordship continued :]

I think I ought to add this : It was rather suggested in the heat of argument that, even if a declaration were made to the effect that these two gentlemen were directors, the defendant company might proceed at once to remove them under article 100 of its articles of association, which enables the company by extraordinary resolution to remove any director from his office. With regard to that suggestion I cannot imagine that the company, having regard to the respect which is ordinarily shown to the decision of a Court of justice, would desire to make that use of article 100 for a purpose for which it can never have been intended. If my judgment against the defendant company is wrong the company has the usual facilities for having it set right

(1) 41 Ch. D. 462.

SARGANT J. 1915 BRITISH MURAC SYNDICATE, LIMITED v. ALPERTON RUBBER COMPANY, LIMITED.

elsewhere; but while my judgment stands I feel sure that the company will not endeavour to get rid of the effect of that judgment by any such machinery as was suggested.

Solicitors: *Lumley & Lumley; Jenkins, Baker, Reynolds & Co.*

A. C.

SARGANT J. 1915 *June* 11.

In re HAY.

STANLEY GIBBONS, LIMITED *v.* HAY.

[1915 H. 198.]

Administration—Insolvent Estate—Transfer from Chancery Division to Court of Bankruptcy—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 130, *sub-s.* 3.

In an action in the Chancery Division for the administration of the estate of a deceased person an order for administration was made on February 22, 1915, the summons to proceed on accounts and inquiries was issued on May 5, and the advertisements for creditors required their claims to be sent in by July 19 and fixed July 23 as the date for adjudicating on them. An applicant that the proceedings might be ordered to be transferred to the Court of Bankruptcy produced correspondence from the executrix's solicitors stating that so many claims had reached them that they did not know whether there would be sufficient to pay the creditors in full:—

Held, that there was not evidence sufficient to satisfy the Court that the estate was insufficient to pay its debts, and that, however that might be, there was no such circumstance of convenience, delay, or expense as justified the Court in making the order for transfer.

In re York (1887) 36 Ch. D. 233 and *In re Kenward* (1906) 94 L. T. 277 distinguished.

Quaere, whether an order for transfer under s. 130, sub-s. 3, of the Bankruptcy Act, 1914, can be made after judgment in the administration action.

THE deceased was killed in action on September 14, 1914.

At the end of December, 1914, a debt of over 50*l.* was due from his estate to Newland Tarleton & Co., Limited, his landlords, for rent, and with reference to this debt and his estate correspondence took place between the landlords' solicitors and the solicitors of the executrix appointed by his will.

On January 23, 1915, probate of the will was granted to the executrix, and on February 22 an order in chambers was made by Sargant J. (on the application by originating summons

of Stanley Gibbons, Limited, who were creditors) for the administration of the testator's personal estate, including the usual account of what was due to the plaintiffs and all other the creditors of the testator.

The solicitors of the executrix on January 26 informed the solicitors for Stanley Gibbons, Limited, of the proceedings having been commenced, and subsequently of the administration order having been obtained, and on May 15, in answer to inquiries by the latter, informed them that the plaintiffs had obtained directions for the issue of advertisements for creditors, under which claims were to be sent in by July 19, which were to be adjudicated on on July 23. The writers added: "So many claims of which we were not aware have reached us that we do not know whether there will be sufficient to pay the creditors in full, but we shall be in a better position as to this when the time for claims has expired."

On June 1 Newland Tarleton & Co., Limited, served on the plaintiffs and the executrix notice of motion for a transfer of the administration proceedings to the Bankruptcy Court under s. 130, sub-s. 3, of the Bankruptcy Act, 1914. (1) In the evidence in support of the motion it was alleged that the estate of the testator was insufficient to pay his debts and that there was then owing to the landlords 285*l*. The deponent also

(1) By s. 130 of the Bankruptcy Act, 1914, sub-s. 1, a creditor whose debt would have been sufficient to support a bankruptcy petition may petition the Bankruptcy Court for an order for administration of the estate of the deceased debtor according to the law of bankruptcy. By sub-s. 2 the Court may, on proof of the petitioner's death, "unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate." By sub-s. 3, "A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may, when satisfied that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon the last mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor."

SARGANT J. exhibited the correspondence containing the letters mentioned above and stated that no steps were taken to advertise for creditors until May 18, 1915. In an affidavit by the managing clerk of the plaintiffs' solicitors it was stated that the order for administration was entered on March 9, that a summons to proceed was issued on May 5, and that on the return of this summons the Master directed the advertisements for creditors.

1915

HAY, *In re.* STANLEY GIBBONS, LIMITED *v.* HAY.

C. N. Tindale Davis, for the landlords. This is a proper case for transferring the administration proceedings to the Bankruptcy Court. Sect. 130, sub-s. 3, of the Bankruptcy Act, 1914, is in effect a re-enactment of s. 125, sub-s. 4, of the Bankruptcy Act, 1883, as amended by s. 29 of the Bankruptcy Act, 1890. The intention of the Legislature, as shown in provisions of the Act of 1883, was that estates of deceased insolvents should be administered in bankruptcy in the same way, so far as possible, as those of living bankrupts, and in the absence of any special reasons for retention—as, for instance, that difficult questions of law are involved or that the proceedings are already far advanced in the Chancery Division—an order for transfer ought to be made: *In re Kenward.* (1) A transfer may be made even after judgment and further subsequent proceedings in the administration action: *In re York.* (2) In that case Stirling J. said that in the exercise of the discretion the predominant considerations must be those of convenience, delay, and expense. No doubt there is a discretion in the Court: *In re Baker.* (3) This is a case in which it is convenient to have the matter transferred and where there has been some delay already in the action. The correspondence shows that the estate is insolvent.

E. E. H. Brydges, for the plaintiffs. It is only proved that there is a probability that the estate will turn out to be insolvent. It is doubtful whether the decision of Stirling J. that a transfer could be made after judgment was right. In *In re Briggs* (4) Lindley L.J. thought that, at any rate before the Act of 1890, notwithstanding the decision of Stirling J., there would have been a difficulty in making a transfer after judgment, and he

(1) 94 L. T. 277.
(2) 36 Ch. D. 233.
(3) (1890) 44 Ch. D. 262.
(4) (1891) 7 Times L. R. 572.

only there assumed that it could then be made. The fact that in bankruptcy there could be a committee of inspection was held, in *In re Briggs* (1), not to be a sufficient reason for making the transfer. As to delay, the matter will be practically over in July when the inquiries are answered.

[He was stopped by the Court.]

Cyril Hartree, for the defendant executrix, was not called upon.

SARGANT J. The application for an order of transfer is made under s. 130, sub-s. 3, of the Bankruptcy Act, 1914, which gives the Court in which the action is pending power to make the transfer "when satisfied that the estate is insufficient to pay its debts." It is a condition precedent to making the order that the Court shall be judicially satisfied of the insolvency of the estate. Here the correspondence does not say that the estate is insolvent although it suggests the probability that it may be so. It is not, in my judgment, sufficient to show that there is not at present cash enough in hand to pay the debts in full. But even if that view is not correct, and the condition precedent has been satisfied, I have still to regard what Stirling J. (2) called "the predominant considerations . . . . of convenience, delay, and expense." Here the proceedings have gone so far in chambers in the Chancery Division that the claims on the estate can be ascertained by the end of next month. This case is not in the least like *In re York* (3) or *In re Kenward* (4), in both of which there were reasons for transferring the proceedings to a local Court having jurisdiction in bankruptcy.

I decline to make the order for transfer, but I will not order the applicants to pay the costs. The costs of the plaintiffs and the defendant will be costs in the action.

Under the circumstances I have not to consider whether the decision of Stirling J., that a transfer can be made after judgment, is correct.

Solicitors for applicants: *Cattarns, Cattarns & Harris.*
Solicitors for plaintiffs: *Beale & Co.*
Solicitors for defendant: *Witham, Roskell, Munster & Weld.*

(1) 7 Times L. R. 572.
(2) 36 Ch. D. 238.
(3) 36 Ch. D. 233.
(4) 94 L. T. 277.

SARGANT J.
1915
June 15.

In re BRITISH MILK PRODUCTS COMPANY'S APPLICATION.

[1915 B. 1138.]

Trade Marks—Registration—Name of Incorporated Company in Ordinary Handwriting—Representation in a "special or particular manner"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9.

The name of an unincorporated company is not "represented in a special or particular manner" within the meaning of s. 9 of the Trade Marks Act, 1905, by the fact that it is written, like a signature, in more or less ordinary handwriting, and is not, when so written, registrable as a trade mark.

This was a motion by the British Milk Products Company, Limited, by way of appeal from the Registrar of Trade Marks, and asking for an order directing the registrar to proceed with the registration of the company's mark as a trade mark. The mark consisted of the written name of the company in an abbreviated form—a signature in fact—namely, "The British Milk Products Co. Ltd." It was not disclosed in whose handwriting the name was. The registration asked for was in class 3, in respect of Chemical Substances prepared for use in Medicine and Pharmacy.

The registrar, in his statement of the reasons for refusing registration, said: "Sect. 9 of the Trade Marks Act, 1905, provides that a registrable trade mark must contain or consist of at least one of certain essential particulars as therein mentioned (1), and,

(1) Sect. 9 of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), so far as material, is as follows: "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the

in my view, the proposed mark does not show any such essential particular. It might be argued that the mark was the name of a company represented in a special or particular manner, but the mere fact that the name is in a certain script does not differentiate it from the name when in some other script, so as to make it a distinctive mark, that is, one which is adapted to distinguish. Such a reading, moreover, would make the second paragraph of the section unnecessary and is really disposed of by paragraph 5. Again, the mark does not show the signature of the applicants, for a corporation has no signature. But, even if the application is technically within the statute, it may be refused as a matter of discretion. What right can any company have in any such words as 'British milk products'? Of course, none, and therefore it is wise to exact, even in a company's signature, something more personal than such common words, and more individualised than descriptive matter which is open to everybody. In the circumstances the application has been refused because it does not satisfy the requirements of s. 9 of the statute, as well as in the exercise of the discretion which the registrar is bound to exercise in such cases."

L. B. Sebastian, for the appellants. The mark proposed to be registered is the name of the company in the usual shortened form, and written as an individual would write his signature. The words used are not in block letters, but in script.

[SARGANT J. Is not this case very like the "W. & G." mark in *Registrar of Trade Marks* v. *W. & G. Du Cros?* (1)]

The letters in that case were not even those of the company, and might be the initials of other companies or firms. Here the mark is the actual name of the company, and a company, if its name is not its property, has rights in its name which the Court will protect by injunction: *Merchant Banking Company of London*

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descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark; . . .

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons . . ."

(1) [1913] A. C. 624, 632, 634.

SARGANT J. 1915 BRITISH MILK PRODUCTS COMPANY'S APPLICATION, *In re.*

v. *Merchants' Joint Stock Bank* (1); *Hendriks* v. *Montagu* (2); Companies (Consolidation) Act, 1908, s. 8.

[SARGANT J. referred to *Rex* v. *Registrar of Companies.* (3)]

The present case comes within the first paragraph of s. 9, which provides for registration of "the name of a company, individual, or firm represented in a special or particular manner." The signature "John Smith" would be a registrable mark, and if a company cannot register its name, when written like a signature, it is, without any just reason, in a worse position than an individual is. [He also referred to *In re California Fig Syrup Co.* (4); *Kodak* v. *London Stereoscopic and Photographic Co.* (5); *In re Farbenfabriken Application.* (6)]

Austen-Cartmell, for the Registrar of Trade Marks, was not called on to address the Court.

SARGANT J. In my opinion, the decision of the registrar is right and ought to be affirmed. The name of the company, which is sought by the company to be registered as a trade mark, is represented in ordinary handwriting as distinguished from print. The applicants say that that is a registrable mark within s. 9 of the Trade Marks Act, 1905, being "the name of a company, individual, or firm represented in a special or particular manner." In my opinion, the name of this company is not "represented in a special or particular manner" within the meaning of that section merely because it is written in more or less ordinary handwriting, and I think that the observations made in the House of Lords in *Registrar of Trade Marks* v. *W. & G. Du Cros* (7), with reference to the application No. 328,990, that is the application to register the letters "W" and "G" written in cursive characters, apply to the case before me.

The appeal must be dismissed with costs.

Solicitors for the appellants: *Neve, Beck & Kirby.*

Solicitor for the registrar: *Solicitor to the Board of Trade.*

(1) (1878) 9 Ch. D. 560.
(2) (1881) 17 Ch. D. 638.
(3) [1912] 3 K. B. 23.
(4) [1910] 1 Ch. 130.
(5) (1903) 20 Rep. Pat. Cas. 337.
(6) [1894] 1 Ch. 645, 651.
(7) [1913] A. C. 624, 632, 634.

F. E.

In re WEIGHTMAN'S SETTLEMENT. ASTLE *v.* WAINWRIGHT.

JOYCE J.
1915
June 4, 9.

[1914 W. 2854.]

Power of Appointment—Power to A. and B. jointly by Deed and to the Survivor by Will—Joint Appointment—Reservation of Power of Revocation by Deed to Appointors and the Survivor—Subsequent Revocation and New Appointment by Survivor by Deed—Valid Revocation—Invalid Appointment.

By a marriage settlement certain property was settled upon trust for the children of the marriage in such shares and manner as the husband and wife during their joint lives by any deed or deeds legally executed by both of them, and either with or without power of revocation and new appointment, should appoint; and in default of any such joint appointment, and so far as any such appointment should not extend, then as the survivor of them should by his or her will or codicil appoint. The husband and wife made a joint appointment by deed of the settled property with a proviso that it should be lawful for the husband and wife at any time during the joint lives or for the survivor of them during his or her life by any deed or deeds to revoke either wholly or partially the appointment thereby made.

After the death of the husband, the wife executed a deed revoking the joint appointment and purporting to make a new appointment of the property:—

Held, that the husband and wife had power in their joint appointment to reserve to the survivor a power of revocation by deed, and that the joint appointment had been effectually revoked. (1)

ADJOURNED SUMMONS.

By a marriage settlement dated April 8, 1874, certain real and personal property was settled upon trust after the death of the survivor of the husband and wife for all and every or such one or more of the children of the said intended marriage in such manner for the benefit of the said children or any of them as the husband and wife "during their joint lives by any deed or deeds legally executed by both of them and either with or without power of revocation and new appointment shall direct or appoint And in default of any such joint direction or appointment and so far as any such direction or appointment

(1) It was not contended that in any case the survivor had power to make an appointment by deed, and the Court was clearly of opinion that the attempted new appointment was invalid.

JOYCE J. 1915 WEIGHTMAN'S SETTLEMENT, *In re.* ASTLE *v.* WAINWRIGHT.

shall not extend Then as the survivor of them" the husband and wife "by his or her last will and testament in writing or any codicil or codicils thereto duly executed shall direct or appoint" and subject to and in default of any such appointment in trust in the usual manner for the children of the marriage, sons at twenty-one and daughters at twenty-one or marriage.

By a deed poll dated November 6, 1889, the husband and wife in exercise of the power for this purpose given to them by the settlement and of all other powers them thereunto enabling appointed that the trustees of the settlement should from and after the death of the survivor of the appointors convey and assign the hereditaments, premises, and trust moneys comprised in the settlement unto and to the use of the eldest son of the marriage upon trust to sell the same and divide the net proceeds thereof equally between the five children of the marriage, the four sons taking their shares upon attaining twenty-one and the daughter's share being settled upon her for life with remainder to her children at twenty-one; and it was thereby provided and declared that it should be lawful for the husband and wife at any time during the joint lives or for the survivor of them during his or her life by any deed or deeds to revoke either wholly or partially the appointment thereby made.

The husband died on January 15, 1890.

One of the sons of the marriage died intestate in 1902 having attained twenty-one, and leaving his eldest brother his heir-at-law and his mother and four brothers and sisters his next of kin.

The eldest son of the marriage attained twenty-one and died intestate on June 9, 1909, leaving his widow the plaintiff and two children, the infant defendants, surviving him. Letters of administration to his estate had been granted to the widow, who had since remarried.

By a deed poll dated April 25, 1910, after reciting (inter alia) that in exercise of the power in that behalf reserved to her by the deed poll above mentioned she was desirous of revoking the said appointment and making a new appointment in manner thereinafter appearing, the wife thereby in exercise of the

power reserved to her by the said deed poll revoked and made void all the trusts and estates appointed by the said deed poll and in lieu thereof and in exercise of the power vested in her by the settlement and deed poll and every other power enabling her in that behalf thereby appointed the hereditaments, premises, and trust funds upon certain trusts in favour of her children living at her death and of such of her grandchildren living at her death being children of her deceased eldest son or of any other of her children dying in her lifetime as should attain twenty-one or being female marry under that age, and it was thereby provided and declared that it should be lawful for the wife at any time or times thereafter by any deed or deeds to revoke either wholly or partially the appointment thereby made.

The wife died on November 5, 1911, and the defendants R. S. Clifford and H. Perkins, who were the present trustees of the settlement, were also the executors of her will dated May 5, 1910, which contained nothing that could operate as an exercise of the original power conferred on the survivor by the settlement.

This summons was taken out by the eldest son's widow against the three surviving children of the marriage (all of whom had attained twenty-one), the infant children of the first husband, and the defendants Clifford and Perkins for the determination (inter alia) of the question whether the joint appointment by the deed poll of November 6, 1889, was to any and what extent revoked or affected by the revocation and new appointment contained in the deed poll of April 25, 1910.

Lyttelton Chubb, for the plaintiff. The original power given to the survivor of the husband and wife was to appoint by will or codicil, and upon the joint exercise of the power by the deed poll of 1889 it was not competent to them to reserve power to the survivor to revoke that appointment and make a new appointment, and at any rate they could not reserve a power of revocation by deed to the survivor. That was inconsistent with the original power, and the original appointment to the eldest and the deceased sons was good and still stands. Alternatively,

JOYCE J. 1915 WEIGHTMAN'S SETTLEMENT, *In re.* ASTLE *v.* WAINWRIGHT.

the revocation by the deed poll of April, 1910, being only necessary for the purpose of making the new appointment which was then contemplated and which is not good, the revocation was merely conditional, and the joint power still remains exercised.

C. P. Sanger, for the defendants the two surviving sons. These defendants support the contention put forward on behalf of the plaintiff. The settlement expressly provided that the joint exercise by deed might be either with or without power of revocation and new appointment, but that did not authorize the reservation of a power of revocation to the survivor by deed. The rule that powers of revocation and new appointment may be reserved toties quoties by instruments executing a power is stated in Farwell on Powers, 2nd ed. p. 269, but in *Brudenell* v. *Elwes* (1) and *Dixon* v. *Pyner* (2) there cited and in *In re Harding* (3) there was nothing in the manner in which the power of revocation was reserved inconsistent with the original power, but here the only power given to the survivor is by will, and I submit that the reservation to the survivor of a power of revocation by deed of the joint appointment is not consistent with the original power.

W. G. Hart, for the defendant the married daughter. The reservation of the power of revocation in the deed poll of November, 1889, is good. The power of revocation of a joint appointment can be validly reserved to the survivor of the doness of the power: *In re Harding* (3); *Dixon* v. *Pyner*. (2)

Further, the reservation of a power to the survivor to revoke by deed was good, notwithstanding that the original power conferred on the survivor was to appoint by will. The objects of the power cannot be altered, but the formal mode of execution may be varied by force of a new power reserved: Sugden on Powers, 8th ed. p. 366; Farwell on Powers, 2nd ed. p. 270. The deed poll of April, 1910, is therefore a good revocation, but the new appointment is not good and the property devolves under the trusts in default of appointment.

(1) (1801) 1 East, 442; (1802) 7 Ves. 382.

(2) (1886) 55 L. J. (Ch.) 566; 54 L. T. 748; 34 W. R. 528.

(3) [1894] 3 Ch. 315.

C. E. Shebbeare, for the infant defendants. I adopt the last argument. It was permissible to reserve by the first deed poll a power for the survivor of the appointors to revoke it by deed. This case falls under the fourth statement of the result of the authorities in Sugden on Powers, 8th ed. pp. 387, 388, which shows that where a mere power of revocation is reserved that does not authorize a limitation of new uses. But although the new appointment may be void for whatever reason, the revocation of the earlier appointment is nevertheless good: Sugden on Powers, p. 377.

D. T. King, for the defendant trustees.

Lyttelton Chubb in reply.

Cur. adv. vult.

June 9. JOYCE J. Under a marriage settlement dated April 8, 1874, a power of appointment among children was given to the husband and wife and the survivor which was in these words: [His Lordship read the power of appointment contained in the settlement and continued:] It is important to observe that there is no restriction express or otherwise imposed as to the manner how, or the formalities with which, the power of revocation and new appointment—if any be reserved upon any execution of the joint power of appointment by deed—is to be exercised.

On November 6, 1889, the joint power of appointment by deed was exercised, reserving a power of revocation in these terms: [His Lordship read the power of revocation and continued:] It is important to observe that the deed exercising the joint power of appointment does not give or purport to give any power to make a new appointment by deed or otherwise—nothing whatever is said as to any power to make a new appointment—no such power is reserved at all, only a power to revoke. It is clear that the mere giving of a power of revocation to the survivor, after the death of either husband or wife, was unobjectionable. It was in no sense a delegation of any power. But it is suggested that the power of revocation given to the survivor should have been a power exercisable by will only and not by deed. Why? No authority was cited for this. The settlement

JOYCE J. 1915 WEIGHTMAN'S SETTLEMENT, *In re.* ASTLE *v.* WAINWRIGHT.

conferring the authority to reserve a power of revocation in the appointment imposes no such restriction. What more proper mode of revoking an appointment by deed could there be than by deed? If in the joint appointment power to make a new appointment by deed had been reserved to the survivor, there might possibly have been something to be said. But this was not done or attempted. The real question in this case is whether the power of revocation by deed reserved by the deed of appointment of 1889 was such a power of revocation as was authorized by the original settlement to be reserved upon any appointment, such settlement, as I have already observed, not imposing any restriction upon the subject.

Then, the husband having died, the widow in April, 1910, executed a deed revoking the joint appointment of 1889 and purporting to make a new appointment. It is said that this, to be effectual, should have been by will. There is no authority for this. The statement of Lord St. Leonards at p. 367 of Sugden on Powers, 8th ed., cited in Farwell on Powers, 2nd ed. p. 270, if and so far as applicable, is to the contrary. The only power of revocation the widow had was that conferred by the proviso at the end of the joint appointment, namely, by deed. There is nothing in the original settlement or in the joint appointment to invalidate this revocation by deed of April, 1910. This is a perfectly good and valid exercise of the power of revocation, if such power was well and validly created by the proviso at the end of the joint appointment, as I think it was; and consequently I hold that the joint appointment as exercised by deed was effectually revoked—a consequence of which would be, I suppose, to leave the widow with the power to make a new appointment by will but not by deed.

Neither expressly nor by implication had the widow ever power to make a new appointment by deed; and it is not possible—nor was it contended—that the deed poll of April, 1910, or the latter part of it, could be treated and have effect given to it as a testamentary instrument so as to operate as an exercise of the power of appointment by will given to the survivor of the spouses by the original settlement, although as a matter of fact the deed poll of April, 1910, does purport to reserve a power to

revoke by deed the new appointment which this deed poll purported to make. The result is that the new appointment which the deed poll of April, 1910, purports to make is wholly invalid.

Solicitors: *Indermaur & Brown, for Cliffords, Loughborough and Derby.*

R. M.

In re SAFFORD'S SETTLEMENT.
DAVIES *v.* BURGESS.

[LIVERPOOL DISTRICT REGISTRY.]

[1915 S. 1047.]

Power of Appointment—Marriage Settlement—Power to Wife to appoint by Will during the Continuance of the Coverture—Will made during Husband's Lifetime—Death of Husband leaving Wife surviving—Valid Execution.

By a marriage settlement trust funds were settled by the wife's father upon the usual trusts during the joint lives of the husband and wife and the life of the survivor, and after the death of the survivor for the children of the marriage, and in case there should be no issue of the marriage "Upon trust for such person or persons and for such interest and generally in such manner as" the wife "shall by will during the continuance of the said intended coverture direct or appoint," and in default of and subject to any such appointment upon trust for the settlor, his executors, administrators, and assigns. There was no issue of the marriage. The wife made a will during the coverture whereby she appointed the settled funds. She survived her husband and died without having altered the appointment so made:—

Held, that there was no reason for implying a condition that the wife should not only make her will but should also die during the coverture; that what she had done satisfied the requirements of the deed in reference to the manner of execution of the power; and that the power had been well and validly exercised.

The decision in *In re Illingworth* [1909] 2 Ch. 297 approved.

ADJOURNED SUMMONS.

By a marriage settlement dated November 8, 1854, certain trust funds were settled by the wife's father upon the usual trusts during the joint lives of the husband and wife and the life of the survivor, and after the death of the survivor upon the usual

JOYCE J. 1915 SAFFORD'S SETTLEMENT, *In re.* DAVIES *v.* BURGESS.

trusts in favour of the issue and children of the marriage, and in case there should be no child or other issue of the marriage, which event happened, then "Upon trust for such person or persons and for such interest and generally in such manner as" the wife "shall by will during the continuance of the said intended coverture . . . . direct or appoint and in default of such direction or appointment or so far as none such should extend Upon trust for" the wife's father, his executors, administrators and assigns.

After the marriage further trust funds were brought into settlement and settled upon, with, and subject to the like trusts, powers, and provisions.

There was no issue of the marriage, and on February 7, 1896, during the life of her husband, the wife made her will and thereby appointed the settled fund upon certain trusts.

The husband died on February 14, 1897.

The wife made three codicils to her will after her husband's death, by the first of which she expressly confirmed her will, but in other respects none of the codicils in any way affected the appointment contained in the will.

The wife died on July 2, 1914, and the defendant John Burgess was the surviving executor and trustee of her will.

The wife's father died in 1873, having by his will given all his real and residuary personal estate in trust for his son, who survived his father but had since died, and the defendant John Newcombe was the son's surviving executor. The remaining defendants were the executors of the last surviving trustee of the father's will.

The present trustees of the settlement took out this summons for the determination of the question whether the wife's will was, notwithstanding that she survived her husband, a good and valid execution of the power given to her by the settlement.

F. J. Kerr, for the plaintiffs, stated the facts.

Hughes, K.C., and *C. E. Shebbeare*, for the defendant Burgess. The power is exercisable by a will made during the coverture, and it would be straining the language to say that the will must also take effect during the coverture. Moreover, the will could not take effect until after the wife's death and the consequent

determination of the coverture. The decision of Eve J. in *In re Illingworth* (1) and the cases of *Cave* v. *Cave* (2) and *Cooper* v. *Martin* (3) cited by him are in point, and the appointment is a good and valid exercise of the power.

Tomlin, K.C., and *H. Mather*, for the other defendants. This was a trust fund brought into settlement by the wife's father, and the ultimate trust in the event of there being no child of the marriage and in default of appointment by the wife "during the continuance of the said intended coverture" was a trust for the settlor, his executors or administrators. The words "during the continuance of the said intended coverture" mean that unless she is the first of the spouses to die she is not to have any power of appointment, the reason obviously being that she was not to have power to deal with the property if she became a widow and able to marry again. The mere preparation and execution of a will during her intended coverture was not an appointment; there can be no appointment by will until the death of the appointor, and as she did not die during the then intended coverture the power was not validly exercised. A will does not operate in presenti, and if a power is to be exercised within a certain period it must be exercised by an instrument coming into operation within that period: per Lord Cairns L.J. in *Cooper* v. *Martin* (4); *In re Moses.* (5) *In re Illingworth* (1) is distinguishable from this case, because here there is a context which, we submit, shows that the will must come into operation during the intended coverture, otherwise there is no valid exercise of the power.

[JOYCE J. referred to Halsbury's Laws of England, "Powers," vol. xxiii., pp. 22—23.]

Hughes, K.C., in reply.

Cur. adv. vult.

June 24. JOYCE J. In this case I reserved judgment, not because I entertained any doubt upon the question, but because I desired to look into some of the cases to which reference was made during argument.

(1) [1909] 2 Ch. 297.
(2) (1856) 8 D. M. & G. 131.
(3) (1867) L. R. 3 Ch. 47.
(4) L. R. 3 Ch. 56.
(5) [1902] 1 Ch. 100.

JOYCE J. 1915 — SAFFORD'S SETTLEMENT, *In re.* DAVIES *v.* BURGESS.

In 1854 a marriage settlement was executed under which, after the death of the survivor of the husband and wife, the settled trust funds, in the event of there being no issue of the marriage, were directed to be held upon trust for such persons as the wife should "by will during the continuance of the said intended coverture direct or appoint" and in default of appointment upon the trust therein mentioned.

The form of the limitation is unusual, and is the result of extensive erasures and alterations in the deed after it was engrossed, but we must take the words as we find them.

There was no issue of the marriage, and in 1896 Mrs. Safford, the wife, made a will purporting to dispose of all her property which she had power to appoint or dispose of by will, either under the marriage settlement or otherwise. Her husband died in 1897, leaving Mrs. Safford his widow, who survived until 1914.

The question is now raised whether the settlement funds pass under the appointment made by the will, or as in default of appointment, it being contended that Mrs. Safford's will, although duly made, is ineffectual as an appointment of the funds subject to the trusts of the marriage settlement, because it did not, it is said, come into operation during the continuance of the coverture by the death of the testatrix while she was covert. I do not see how the will of any testatrix could possibly come into operation during the continuance of her coverture. Her coverture would determine by her death, and her will does not come into operation until after her death when the coverture has determined.

But really the words of the limitation creating the power are perfectly plain, simple and unambiguous, and to my mind there can be no doubt or question about their meaning, and it is not necessary to supply or understand a single word that is not there. The testatrix has directed and appointed by will how the fund is to be disposed of, and she has done this while covert "during the continuance of the intended coverture." What she has done satisfies the requirements of the deed in reference to the manner in which the power is to be executed. There is no more to be said. There is no authority requiring me to supply or understand at all the additional condition that the testatrix

shall not only make her will but shall also die during the coverture.

In *Cooper* v. *Martin* (1) a testator directed the proceeds of sale of real estate to be held upon trusts for his children and issue in such manner and in such shares as his wife before each and every of his said children should have attained the age of twenty-five years or have died under that age by any deed or instrument in writing to be sealed and delivered by his said wife should either absolutely or with power of revocation and new appointment direct, limit, or appoint; and in default in trust for the younger children equally. On April 5, 1841, the widow, before the youngest child attained twenty-five, duly executed an appointment by deed poll reserving a power of revocation and new appointment by deed. Then later in the same month of April, 1841, she made a will giving and appointing Pain's Hill estate, a specific part of the real estate, to the eldest son. This also was before the youngest child attained twenty-five, which did not happen until 1851, and the testatrix lived until 1863. In the circumstances Lord Cairns L.J. declined to treat the will as being in equity a valid execution of the testatrix's power to appoint by deed before the youngest child attained twenty-five, which he considered an essential requisite to the exercise of the power. Rolt L.J. agreed, and, as I understand, considered that the power could not be exercised by will at all, even in equity, but only by deed. If in the present case Mrs. Safford's power had been a power to appoint, not by will, but by deed, the decision in *Cooper* v. *Martin* (1) might have been relevant to the question I have to determine, but in the circumstances, inasmuch as her power to appoint was by will, and only by will, not by deed, I think that *Cooper* v. *Martin* (1) has no application.

In *In re Illingworth* (2), where the power to appoint was "during the coverture by will or deed," Eve J. held that the execution by the wife of her will in the lifetime of her husband, whom she survived, operated as a good exercise of the power of testamentary appointment contained in the settlement, notwithstanding that she died discovert. I agree with that decision, but I prefer to base my judgment upon the reasons I have given rather

(1) L. R. 3 Ch. 47. (2) [1909] 2 Ch. 297.

JOYCE J. 1915 SAFFORD'S SETTLEMENT, *In re.* DAVIES *v.* BURGESS.

than upon any of the authorities cited in *In re Illingworth* (1), which in my opinion have very little to do with the question.

I shall therefore make a declaration that there has been a good and valid execution of the power of appointment by the testatrix.

Solicitors: *Robert Davies & Co., Warrington.*

R. M.

EVE J. 1915 *July* 1.

In re CLARKSON.

PUBLIC TRUSTEE *v.* CLARKSON.

[1914 C. 1940.]

Will—Construction—Substitutional Gift—Children "shall be paid" Parent's Share—Joint Tenancy or Tenancy in Common.

Testator, after bequeathing leaseholds on trust to pay the rents to his grandson for life and on his death to sell and pay the proceeds to and amongst his nephews and nieces as tenants in common, directed that in case of the death of any of his nephews and nieces the children of the one dying should "be paid" the parent's share:—

Held, that the children took as joint tenants and not as tenants in common.

Dictum of North J. in *In re Atkinson* [1892] 3 Ch. 52, at p. 54—to the effect that if money is to "be paid" to several persons who take an absolute interest they must take as tenants in common—considered and not followed.

ADJOURNED SUMMONS.

By his will dated October 22, 1864, Joseph Clarkson, after giving all his personal estate except leasehold on trust for conversion and payment thereout of his debts, funeral and testamentary expenses and legacies, and investment of the residue as therein mentioned, gave and bequeathed his leasehold lands, tenements, and hereditaments upon trust out of the rents and profits thereof to pay to his wife Elizabeth during her life the annual sum of 50*l.*, and subject thereto to pay the surplus to his grandson Joseph Clarkson for life, and after the decease of his grandson on trust to hold the same hereditaments and premises and other

(1) [1909] 2 Ch. 297.

his estate in trust for the children of his grandson as therein mentioned, and, in case his grandson should die without leaving issue, then upon trust to sell the said leasehold estates either together or in parcels; and the testator declared that the trustees should stand possessed of the proceeds of sale upon trust "to pay the proceeds arising from such sale or sales unto and amongst all my nephews and nieces children of my brothers Thomas and John and of my sisters Elizabeth and Rachel in equal shares and proportions as tenants in common and in case of the death of any one or more of them I direct the child or children of such one or more of my said nephews and nieces respectively so dying shall be paid a parent's share."

The testator died on October 28, 1864, and his will was duly proved.

Elizabeth Clarkson, his widow, died in 1868.

The testator had only one nephew or niece, namely, John, who died in 1880.

Joseph Clarkson, the grandson, died in 1912 without having had issue.

John, the nephew, had two sons, Thomas, who died in 1913, and the defendant.

The plaintiff, who was now the trustee of the will, having money in his hands, proceeds of sale of the leaseholds, which he desired to distribute, the question was who was entitled to it.

F. T. Duka, for the plaintiff.

F. E. Farrer, for the defendant. The direction that the "children of such one of my nephews so dying shall be paid a parent's share" creates a joint tenancy in the children, and, there having been no severance, the survivor takes the whole.

H. S. Preston, for the widow of Thomas, the defendant's brother. There has not been any severance of a joint tenancy. On the true construction of the clause a tenancy in common was created, and not a joint tenancy. That is shown by the use of the words "be paid." You cannot "pay" to a number of persons except as tenants in common: *In re Atkinson.* (1) There North J. says: "If money is to be paid to persons who

(1) [1892] 3 Ch. 52, 54.

EVE J.
1915
CLARKSON, *In re.* PUBLIC TRUSTEE *v.* CLARKSON.

take an absolute interest it is difficult to see how you are to pay them as joint tenants. They must take as tenants in common, unless the fund is retained by the trustees."

But, apart from that, upon the whole gift, the result is the same. The general principle is that the Court decrees a tenancy in common as much as it can. What is called in Jarman on Wills, 6th ed. vol. ii. p. 1794, "a curious exception" to that principle, where the gift is to a compound class, ought not to be extended. This was not a gift to a compound class. It was a substitutional gift: Jarman on Wills, 6th ed. vol. ii. pp. 1330, 1789.

F. E. Farrer in reply. The widow of Thomas has to establish that a gift to two is a tenancy in common and not a joint tenancy. She fails. In the first gift there are clear words of severance, in the second not. In *Campbell* v. *Campbell* (1) one third was given unto and amongst the children of A., one third unto the children of B. without the words "and amongst," and the remaining third unto and amongst the children of C. Lord Alvanley held that the children of B. took as joint tenants, but that the children of A. and C. took as tenants in common; he said (2) that it was better to preserve rules of construction than to speculate on what a testator if asked would have said was his meaning. In *Crooke* v. *De Vandes* (3) the material words were "what remains to go to my grandsons," and were held to confer a joint tenancy in the capital, though the interest was for thirty years given to the grandchildren as tenants in common. In *Morgan* v. *Britten* (4) the words were "in trust for all and every," &c., and were held to create a joint tenancy.

The words "shall be paid" do not amount to words of severance; they are not like "divided," which per se imports a severance. *Morley* v. *Bird* (5) is a clear authority that a direction to "pay" does not import severance. The dictum in *In re Atkinson* (6) is clearly opposed to all the above cited authorities and cannot be supported. North J. was trying to distinguish *Gordon* v. *Atkinson* (7) from the case before him.

(1) (1792) 4 Bro. C. C. 15.
(2) 4 Bro. C. C. 18.
(3) (1803) 9 Ves. 197, 206.
(4) (1871) L. R. 13 Eq. 28.
(5) (1798) 3 Ves. 628.
(6) [1892] 3 Ch. 52, 54.
(7) (1847) 1 De G. & Sm. 478.

The true distinction between those two cases is that in the latter there were double words of severance.

EVE J. The testator made his will on the 22nd and died on the 28th of October, 1864. He thereby bequeathed his leasehold property to trustees upon trust, in the events which have happened, to pay the rents to his grandson Joseph Clarkson for life, and on his death, which took place on July 27, 1912, testator directed his trustees to sell the property and to stand possessed of the proceeds of sale upon trust to pay the same "unto and amongst all my nephews and nieces children of my brothers Thomas and John and of my sisters Elizabeth and Rachel in equal shares and proportions as tenants in common and in case of the death of any one or more of them I direct the child or children of such one or more of my said nephews and nieces respectively so dying shall be paid a parent's share." The only one of the four brothers and sisters of the testator who had any children was Thomas. He had a son, John, who died in 1880. John had two sons, Thomas and John Tose Clarkson, the defendant. Thomas survived Joseph Clarkson, the tenant for life, and died intestate in 1913. The question I have to decide is whether in these circumstances the proceeds of sale are divisible in moieties between the defendant and the representative of his late brother Thomas or whether the defendant takes the entirety —in other words, whether the defendant and his late brother took as joint tenants or as tenants in common.

It is common ground that in construing a gift of this description the Court will be astute to discover any indication of an intention on the part of the testator to create a tenancy in common. Many different expressions have been held sufficient to indicate such an intention, and there will be found in Jarman on Wills, 6th ed. p. 1791, what would seem to be a more or less exhaustive list of such expressions. Prima facie the words "I direct the child or children of such one or more of my said nephews and nieces respectively so dying shall be paid a parent's share" appear to me to create a joint tenancy, and not the less so when I contrast them with the immediately preceding gift to the nephews and nieces and find the testator using a redundancy of words and

EVE J.
1915
CLARKSON, *In re.* PUBLIC TRUSTEE *v.* CLARKSON.

phrases conclusively showing that nephews and nieces were intended to take as tenants in common.

But it is contended that in the words "be paid" is to be found an indication of an intention to create a tenancy in common and not a joint tenancy. I doubt myself whether such effect ought to be given to the words, and but for something which was said by North J. in *In re Atkinson* (1) I should not have hesitated in holding that they have no such effect. In that case the learned judge at a point in his judgment where he is endeavouring to reconcile one particular authority with others which had been cited to him makes the following observations: "I have felt some difficulty as to *Gordon* v. *Atkinson* (2), because Knight Bruce V.-C. did not point out any distinction between that case and the others to which I have referred. But I think he must have based his decision upon the different language of the will which he was construing. The words of the will in that case were, 'to pay, assign, and transfer the same trust moneys, stocks, funds, and securities' unto four persons named, 'and to each of their respective heirs, executors, administrators, and assigns,' and if money is to be paid to persons who take an absolute interest it is difficult to see how you are to pay them as joint tenants. They must take as tenants in common, unless the fund is retained by the trustees." Those observations did not constitute a necessary part of the actual decision of North J. and were only intended to demonstrate how in his opinion the decision of Knight Bruce V.-C. in *Gordon* v. *Atkinson* (2) might be reconciled with the other authorities. At the same time they are of course entitled to be treated with all possible respect and to be acted upon unless further argument leads to the conclusion that a simple direction "to pay" a legacy or share of residue to more than one person is not sufficient to make the recipients tenants in common. Do not the further arguments to which I have just listened lead to the conclusion I have indicated? A direct gift of a legacy or share of residue to A., B., and C. makes them joint tenants of the legacy or share, and the same result follows if the gift be to trustees upon trust for A., B., and C. In each case the testator's intentions can only be given effect to by payment,

(1) [1892] 3 Ch. 52, 54. (2) 1 De G. & Sm. 478.

and yet in determining when payment can properly be made the nature of the gift must, as it seems to me, be ascertained without reference to the fact that, as it cannot be completed without payment, every such gift of necessity involves an implied direction to the executor or trustee to pay.

If this be so I cannot bring myself to hold that where the gift is in precisely the same terms it is to be differently construed in cases where the direction to pay is express and not implied.

In other words, a bequest to A., B., and C. of a pecuniary legacy is in my opinion indistinguishable in these respects from one which takes the form of a direction to the executor to pay A., B., and C. the legacy. In each case A., B., and C. take as joint tenants.

I think any other conclusion might involve a departure from some of the long-established rules of construction on which Mr. Farrer has insisted and relied.

Finally I am justified in the opinion at which I have arrived by the entire absence of any authority—other than the dictum of North J.—going to support the view contended for on behalf of Thomas's representative. There must have been many cases in which a direction to pay has been expressed in connection with a gift in joint tenancy, and, had it ever occurred to any one to suggest that the presence of the direction was in itself a sufficient indication of an intention to create a tenancy in common, I cannot help thinking the point would have been discussed and decided long ere this.

Accordingly I hold here that there was a joint tenancy, and, there having been no severance, the whole share belongs to the defendant.

Solicitors: *Radford & Frankland, for Rhodes & Buchannan, Thirsk; Blunt & Co.*

A. L.

SARGANT J.

1915

May 11, 12, 13, 14, 17, 19.

MALLAM *v.* ROSE.

[1915 M. 387.]

Easement—Light—Enjoyment—Interruption—Tenancy of Dominant Tenement under Person occupying Servient Tenement—Verbal Agreement of Tenancy—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

During the period relied on by persons claiming the right of access of light to windows in the alleged dominant tenement, a person had, for more than the time required to render that period insufficient to establish an easement of light under the Prescription Act, 1832, been the yearly tenant of the rooms in that tenement lighted by the windows under a verbal agreement with a person who was also during the tenancy the occupier of the servient tenement:—

Held, that, as the tenancy was only verbal, the access of light during its continuance was not "enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing," as required by s. 3 of the Act, and that the existence of the tenancy did not prevent the owners of the dominant tenement from acquiring the right to the access of light through the windows.

Harbidge v. *Warwick* (1849) 3 Ex. 552 explained.

The plaintiffs in this action were Mary L. K. Mallam and William Henry Baker; and the defendants were Thomas Harry Rose, Douglas Murfin Rose, and Harry Cecil Rose.

The plaintiff Mary L. K. Mallam was the owner in fee simple of a house and show-rooms, being No. 1A, Broad Street, Oxford, on the south side of that street, and the plaintiff W. H. Baker was her lessee for a term of about twelve years from June 24, 1912.

The defendant T. H. Rose was the owner in fee simple of certain lands and buildings on the west side of the plaintiffs' premises, being No. 1, Broad Street, and the defendants D. M. Rose and H. C. Rose (who were his sons) were in possession of No. 1, Broad Street under a building agreement. The sons pulled down the buildings which constituted No. 1, Broad Street and were rebuilding in a manner which was alleged to be an illegal obstruction of certain alleged ancient rights of light in respect of windows in the west wall of the plaintiffs' buildings. The plaintiffs claimed an injunction restraining the defendants from erecting or continuing the erection on the defendants' premises of any building so as to constitute a nuisance or legal

obstruction to any of the ancient lights of the plaintiffs as the same existed previously to the taking down of the defendants' buildings.

Subject to the question of costs (which is not material to this report) no relief was ultimately asked against the defendant T. H. Rose.

The original claim was in respect of the plaintiffs' five windows and a skylight, A, B, C, D, E, and F, but the claims in respect of window E and the skylight (F) were abandoned by the plaintiffs at the trial.

Window A, in the plaintiffs' premises, was on the second floor thereof; and gave light to a staircase in that building, No. 1A, Broad Street.

Window B was also on the same second floor and gave light to a bedroom.

Window C was on the first floor of the plaintiffs' premises (under window B) and gave light to a bedroom.

Window D was further than the others from the front of the plaintiffs' premises.

In April, 1829, the premises No. 1A, Broad Street, and also the premises No. 1, Broad Street, were owned by the same persons, and by a deed dated April 29, 1829, they granted No. 1A to John Smith in fee simple. One John James Coles joined in and executed this conveyance to Smith.

On the same April 29, 1829, but later in the day, the owners granted No. 1, Broad Street to J. J. Coles in fee simple. Smith was expressed to join in the conveyance to Coles, but never executed the deed.

Each of them, Smith and Coles, was well aware of the grant made to the other of them, and the learned judge at the trial, on the authority of *Wheeldon* v. *Burrows* (1) and *Allen* v. *Taylor* (2), held that the grant to Smith, the predecessor in title of the plaintiffs, gave him the right to the access of light over No. 1, Broad Street through the windows then existing in No. 1A. The learned judge found at the trial that window A was then existing and obtained the right to access of light under the conveyance to Smith of No. 1A, Broad Street.

(1) (1879) 12 Ch. D. 31. (2) (1880) 16 Ch. D. 355.

SARGANT J. 1915 MALLAM v. ROSE.

Windows B, C, and D were found to have been first opened about fifty or sixty years before the trial, when certain alterations were made in the building of No. 1A, and these three windows acquired no right to access of light under Smith's conveyance. In respect of these three windows, therefore, the plaintiffs had to set up a right to access of light under the Prescription Act, 1832. Prior to 1893 a Mr. Baker was occupying as his shop, not only No. 1, Broad Street, but also the rooms in No. 1A, Broad Street lighted by windows C and D. In 1893 Baker gave up possession of these rooms to a Mrs. Collins in order that she might let them (together with other rooms in her house) as university lodgings, for which purpose those two rooms and the room lighted by window B were continuously used down to the time of the commencement of the action.

For a portion of this time (from about 1894 to 1899, but at any rate for a number of years sufficient to prevent the statute running if that could be the effect) Mr. W. H. Baker (who had succeeded Mr. Baker, his father) was the occupier of No. 1, Broad Street and Mrs. Collins was his tenant, under a verbal agreement, of the rooms in No. 1A, Broad Street, lighted by windows B, C, and D.

The action was tried on May 11, 12, 13, 14, 17, and 19, 1915.

Romer, K.C., and *Crossfield*, for the plaintiffs. We say that all the four windows, A, B, C, and D, were in existence at the time when the two deeds of April 29, 1829, were executed, and if that is so the effect of the grant to Smith, the plaintiffs' predecessor in title, was to give him the right to the access of light over No. 1, Broad Street and through the four windows: *Wheeldon* v. *Burrows* (1); *Allen* v. *Taylor*. (2) If any of these windows were not then existing the plaintiffs are driven to rely on the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 2 and 3. The plaintiffs and their predecessors in title have enjoyed the access of light through all these windows for at least the period required by those sections. But the defendants will say that the fact that during our period of enjoyment Mr. Baker, the father, and Mr. W. H. Baker, the son, were

(1) 12 Ch. D. 31. (2) 16 Ch. D. 355.

the occupants of No. 1, Broad Street, and the landlords of Mrs. Collins in respect of the rooms lighted by windows B, C, and D, in No. 1A, Broad Street, shows an interruption sufficient to prevent us from acquiring an easement in respect of those windows. In *Harbidge* v. *Warwick* (1) the Court held that s. 3 of the Act converted into a right such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years in the character of an easement, distinct from the land itself; and Parke B., in delivering the judgment of the Court, says also: "It follows that the Legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time." He is there referring to such an interruption as could be made as a matter of fact and not such an one as must be a legal interruption. The mere fact that Mr. W. H. Baker could not during Mrs. Collins's tenancy from himself block up her windows without being liable to an injunction did not prevent the statute running in our favour unless Mrs. Collins's right to access of light "was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing," as required by s. 3 of the Prescription Act. The yearly tenancy of Mrs. Collins was under a verbal agreement, and the mere fact that two houses are held by different persons under the same landlord does not prevent one of the tenants from acquiring an indefeasible right against the other: *Frewen* v. *Philipps* (2); and the right enures not only as against the other tenant but as against the common landlord: *Morgan* v. *Fear.* (3) Even an exception, in a lease of land and its appurtenances, of rights restricting the free use of any adjoining land, or the appropriation of the same for building or other purposes, obstructive or otherwise, is not such an agreement or consent as is required by s. 3 of the Act: *Mitchell* v. *Cantrill.* (4) [They also referred to *Simper* v. *Foley* (5); *Ladyman* v. *Grave* (6); *Hyman* v. *Van Den Bergh* (7); *Aynsley* v. *Glover* (8); *Tapling* v. *Jones.* (9)]

(1) 3 Ex. 552, 557.
(2) (1861) 11 C. B. (N.S.) 449.
(3) [1907] A. C. 425.
(4) (1887) 37 Ch. D. 56.
(5) (1862) 2 J. & H. 555.
(6) (1871) L. R. 6 Ch. 763.
(7) [1907] 2 Ch. 516; [1908] 1 Ch. 167.
(8) (1875) L. R. 10 Ch. 283.
(9) (1865) 11 H. L. C. 290.

SARGANT J. 1915 MALLAM v. ROSE.

Martelli, K.C., and *Hubert A. Rose*, for the defendant T. H. Rose.

Rolt, K.C., and *H. S. Preston*, for the defendants D. M. Rose and H. C. Rose. The plaintiffs have failed to show that any of the windows A, B, C, and D existed at the time when the deeds of 1829 were executed.

As regards the claim under the Prescription Act, the period to be considered is the twenty years immediately before action brought. The plaintiffs cannot show an enjoyment of light for that period without an interruption during the time when W. H. Baker was the occupier of one house and Mrs. Collins his tenant of rooms in the other house. Notwithstanding what was said in *Ladyman* v. *Grave* (1), the interruption indicated by the Act need not be an adverse interruption. The Act contemplates a continuous enjoyment of the easement as of right for twenty years next before the action, without interruption acquiesced in for a year: *Battishill* v. *Reed* (2); *Hyman* v. *Van Den Bergh.* (3) If W. H. Baker had obstructed Mrs. Collins's lights she could have obtained an injunction to restrain him from so doing; she could therefore interrupt the enjoyment of the easement at any time during her tenancy, and that brings the case within *Harbidge* v. *Warwick.* (4) The interruption need not be such as to amount to a trespass. It is immaterial that Mrs. Collins's tenancy was under a verbal agreement: *Skull* v. *Glenister.* (5)

[SARGANT J. referred to Carson's Real Property Statutes, 2nd ed. p. 12.]

The point did not arise in *Morgan* v. *Fear.* (6) *Simper* v. *Foley* (7) is an authority in our favour on this point, and although it is wrong as to adding together the fragments of an interrupted period of enjoyment, its correctness on the point before the Court has not been impugned: see *Hyman* v. *Van Den Bergh* (8); *Black* v. *Scottish Temperance Life Assurance Co.* (9);

(1) L. R. 6 Ch. 763.
(2) (1856) 18 C. B. 696, 705.
(3) [1907] 2 Ch. 516, 526.
(4) 3 Ex. 552, 557.
(5) (1864) 16 C. B. (N.S.) 81.
(6) [1907] A. C. 425.
(7) 2 J. & H. 555.
(8) [1907] 2 Ch. 516, 528.
(9) [1908] 1 I. R. 541, 579.

Colls v. *Home and Colonial Stores* (1); *Davis* v. *Marrable* (2); *Dent* v. *Auction Mart Co.* (3); and *Richardson* v. *Graham.* (4) *Romer, K.C.*, in reply.

[Reference was also made to Combe's Law of Light, pp. 201, 205, 207.]

SARGANT J. This is an action in which the plaintiffs, as the owner and lessee respectively of No. 1A, Broad Street, Oxford, are seeking an injunction against the defendants, as the freeholder and the building lessees respectively of adjoining property on the west side (No. 1, Broad Street), to restrain the erection of a large new building on the defendants' land.

The claim was originally in respect of five windows and a skylight, which have been referred to as A, B, C, D, E, and F, and I will refer to the windows lighting the respective rooms in No. 1A by those letters. As regards F, which was a skylight, the claim has been abandoned by the plaintiffs.

Windows A and B are on the second floor of the plaintiffs' building. Window A lights a staircase and window B lights a bedroom.

Windows C and D are on the first floor, and they light two bedrooms, window C being under window B. Window D is further from the front of the house.

The fifth window, window E, lights a room in No. 1A, which is used for the purpose of the business carried on by the first defendant on his premises, No. 1, Broad Street.

It was found, as regards window E, that the plaintiffs' claim could not be supported on any of the three grounds which had been put forward to support the claim, namely, (1.) under the Prescription Act, (2.) under an alleged lost grant, and (3.) under an express grant by a deed executed in the year 1829. Further, in the course of the hearing before me, and having regard to the fact that the defendants' premises during a very large part of the time have been in lease, it was found that the ground of lost grant could not be relied on even as regards windows A, B, C, and D, and that ground has now been abandoned, and I need not

(1) [1904] A. C. 179.
(2) [1913] 2 Ch. 421.
(3) (1866) L. R. 2 Eq. 238.
(4) [1908] 1 K. B. 39.

SARGANT J. refer to it any more, except incidentally with regard to a question of costs.

1915

MALLAM v. ROSE.

With regard to the question of the grant under the deed of 1829 I must say something. It happened that in 1829 one person was the owner both of No. 1A and No. 1, Broad Street, and he by two deeds dated on the same day (of which two, if any importance attaches to the fact, the deed granting No. 1A must be treated as having been executed first) granted the fee simple of No. 1A to one Smith, who is the plaintiffs' predecessor in title, and granted the premises No. 1, Broad Street to one Coles, who is the defendants' predecessor in title. As a matter of fact, Coles joined in the conveyance to Smith, and Smith was expressed to join in the conveyance to Coles, but never executed the document.

It is perfectly clear that each grantee was well aware of the grant to the other, and, on the law as laid down in *Wheeldon* v. *Burrows* (1) and *Allen* v. *Taylor* (2), it seems to me equally clear that the effect of that grant was to give to Smith, the predecessor in title of the plaintiffs, a right to the access of light over No. 1, Broad Street, through the windows which were then existing upon the house No. 1A and facing the house No. 1.

The question then arises what were the windows so existing in the house No. 1A. Now very extensive alterations have been made, both in the house No. 1, Broad Street, before the recent pulling down of that house, and in the house No. 1A, Broad Street, and it is extremely difficult to say, even when I have regard to the very careful plan which was indorsed on each of those deeds in the year 1829, what the condition of the premises No. 1A, Broad Street was, as regards the windows in the west side of it. On the whole I have come to the conclusion that window A was existing at that time. The plan on the deed shows a staircase. It does not show any staircase leading from the first floor to the second floor, but it shows one leading from the ground floor to the first floor. The construction appears to be the same throughout the west wall of No. 1A, Broad Street to a distance considerably south of window A, and the probability is such, in my opinion, as to discharge the onus cast upon the

(1) 12 Ch. D. 31. (2) 16 Ch. D. 355.

plaintiffs, and to lead me to infer that the window A did exist at that time. With regard to windows B, C, and D, however, the case is different. It is clear, I think, that at that time the main back wall of the house came somewhere in the middle of window D, that is, some way to the south of both window B and window C, and I think it is also clear that at some time or another, which neither the plaintiffs nor the defendants have been able to fix, but which is roughly stated to have been about fifty or sixty years ago, the back wall of No. 1A was pulled down, and the present back wall was substituted. The present back wall lies some six or seven feet to the north of the old back wall, and the consequence is that the room lighted by window B and the room lighted by window C is in each case a room substantially different from the room that formerly existed at the rear of No. 1A, Broad Street. The rooms are considerably smaller. It is also clear that, whereas after the addition which was then made there was no light to the south that could possibly come to either of the rooms lighted by window B and window C, there had existed before the alterations nothing whatever to prevent those rooms receiving light from the back in the ordinary way through the south windows. This being so, there is, in my judgment, nothing to show that those two rooms were not at that time lighted, as they naturally would be, by windows from the south. Directly the additional building was added to the south it would be necessary to light the windows from the west, and the existence of these two windows as they exist at present, windows B and C, seems to me at least as compatible with their having been opened at the time when this alteration was made as with their having existed at the time of the grant under the deed of 1829. In my judgment, therefore, although window A has a right under the deed of 1829, windows B, C, and D are not shown to have any such right.

Now I come to the only remaining ground which is open to the plaintiffs in respect of windows B, C, and D, namely the ground that they have a right under the Prescription Act. Prior to the year 1893 a Mr. Baker was occupying the adjoining shop on the west, No. 1, Broad Street, and had also been occupying the rooms lighted by windows C and D as part of his shop. In

SARGANT J. 1915 MALLAM v. ROSE.

1893 he was induced to give up possession of those rooms to a Mrs. Collins, in order that she might let them (together with other rooms in her house) as university lodgings, and from that time forward the rooms lighted by windows C and D, as well as the room lighted by window B, were continuously licensed and occupied as university lodgings down to the time of the issue of the writ of summons in the action, subject to this, that from last year they have been in fact unlet. What is put forward is, that for a portion of this time, from about 1894 to 1899, it does not matter precisely—but for a number of years sufficient to prevent the statute running—Mr. W. H. Baker (who had succeeded Mr. Baker, his father, and who subsequently let to the defendant T. H. Rose) was the occupier of the house opposite, No. 1, Broad Street, and Mrs. Collins was his annual tenant of rooms B, C, and D under a verbal agreement. On that the defendants say that inasmuch as Mrs. Collins was the tenant of Mr. W. H. Baker in respect of the rooms lighted by windows B, C, and D, he, as her landlord, by virtue of the grant to her, year by year, of these rooms, with their windows, must be presumed also to have granted to her, as part of the tenement demised, a right of light during the occupancy over the adjoining premises, No. 1, Broad Street, then occupied by him, and that, that being so, he was legally incapable of interrupting the light, and no easement could be acquired by the plaintiffs' predecessors in title during that period.

In my judgment, that argument is incompatible with the decisions in *Harbidge* v. *Warwick* (1) and *Frewen* v. *Philipps*. (2) In *Harbidge* v. *Warwick* (1) all that was decided was that, in order to acquire an easement under the Prescription Act, it was necessary that the access of light should be enjoyed in the character of an easement, that is to say, that if the person who was actually occupying the dominant tenement was also occupying the servient tenement, no right could be acquired, because the light coming over the servient or alleged servient tenement was coming to him merely as part of his occupation of the whole of the servient tenement. And on the other hand it has been held in a number of cases that the right to light is quite different

(1) 3 Ex. 552. (2) 11 C. B. (N.S.) 449.

from the right to the other easements provided for by the Prescription Act, and that it can be acquired by a lessee as against his own landlord as the owner of adjoining property. It is true, no doubt, that, as a matter of law, Mr. W. H. Baker was, during the period from 1894 to 1899, incapable of obstructing the light, in this sense, that his tenant could have brought an action to restrain him. But I do not think that that is the incapacity which was contemplated in *Harbidge* v. *Warwick*. (1) In the judgment of the Court it is said that the enjoyment of the light must be in the character of an easement, and later on it is said: "It follows that the Legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier at least during some part of the time." I think the words "as could be interrupted by the adjoining occupier at least during some part of the time" mean as could be interrupted as a matter of fact and not as a matter of law, and that if, by virtue of the relations existing between the occupier of the dominant tenement and the occupier of the servient tenement, the latter was precluded from blocking up the light coming to the dominant tenement, that would not prevent the statute running unless the right was given to the owner of the dominant tenement by virtue of some consent expressly made and given for that purpose by deed or writing within the language of s. 3 of the Prescription Act. It is quite clear that s. 3 contemplates the possible existence of agreements for the purpose which are not expressed to be in writing, and negatives their efficacy. And if I were to hold that the acquisition of the right was prevented by the existence of some agreement or consent which was not expressed in writing, I should be disregarding the express terms of s. 3. Further, even if the agreement of tenancy had been in writing, the cases to which I have alluded and particularly *Mitchell* v. *Cantrill* (2) would appear to show that it would not have been within s. 3 and that the lessee actually enjoying the light might have acquired an easement for his holding against the adjoining property of the lessor.

Here, however, the relationship existing between Mrs. Collins and Mr. Baker which is said to have precluded Mr. Baker from

(1) 3 Ex. 552, 556. (2) 37 Ch. D. 56, 62.

SARGANT J. being entitled to block up the light coming to the windows of Mrs. Collins was clearly not an agreement in writing. The demise to her was a verbal one, and during the period of her occupation she seems to me to have been enjoying the right of light coming to her windows as an easement in respect of the dominant tenement and over the servient tenement within the language of *Harbidge* v. *Warwick*. (1) That was a separate and distinct right entirely independent of the general enjoyment of light which she would have had as part of the occupation of the servient tenement had she been the occupier of that also, and which Mr. Baker in fact had in relation to windows C and D during the period immediately preceding the year 1893. In my judgment it is this earlier period only which would so far as regards these two windows have been prevented from being counted by the decision in *Harbidge* v. *Warwick* (1), and this earlier period is not necessary for the plaintiffs' case. The plaintiffs have therefore in my opinion established a right under the Prescription Act as regards all the four windows A, B, C and D.

1915

MALLAM v. ROSE.

The only other question which I have to determine is whether there is an obstruction of light amounting to a nuisance, and with regard to that the case is one in which res ipsa loquitur. [His Lordship decided on the facts that as regarded windows B, C, and D there was ground for giving relief by way of injunction and not by way of damages; and he concluded as follows:] On the other hand, I should say that if I am wrong in my interpretation of the Prescription Act, and if no right has been acquired under that Act in respect of windows B, C, and D, and the only right which the plaintiffs have is under the deed of 1829, and in respect of the staircase window A only, then I think that the wrong to the plaintiffs is one which would be satisfied by damages, and I should grant an inquiry as to damages in lieu of an injunction. But, on the view I take of the law under the Prescription Act, windows B, C, and D, as well as window A, have a right to the enjoyment of light, and that being so it seems to me that damages would not be a sufficient remedy, and that an injunction must be granted against the defendants

(1) 3 Ex. 552.

Douglas Murfin Rose and Harry Cecil Rose in respect of windows A, B, C, and D.

SARGANT J.
1915
MALLAM v. ROSE.

Solicitors for plaintiffs: *Valpy, Peckham & Chaplin, for Thomas Mallam & Co., Oxford.*

Solicitors for defendants: *Andrew Walsh, Gray & Rose, London and Oxford.*

F. E.

GALLOWAY *v.* HALLÉ CONCERTS SOCIETY.

SARGANT J.
1915
June 4.

[1915 G. 771.]

Company—Guarantee—Liability of Members to contribute Additional Sum—Call of Full Amount on Two Members only—Validity—Proper Case for Discrimination—Dilatoriness in paying Previous Calls—Injunction—Declaration of Right.

The articles of association of a company limited by guarantee provided that each member should be liable to contribute and should when demanded pay to the committee any sum or sums not exceeding in the aggregate the sum of 100*l.* (therein called the contribution) in addition to any liability in case of winding up under the guarantee clause in the memorandum, and that the committee might from time to time make such calls as they thought fit upon each member in respect of all moneys unpaid on his contribution, and that each member should pay the amount of every call so made upon him as appointed by the committee. Two members of the society had for some time past objected to the policy of the committee and had been dilatory in the payment of two small calls. A third call of 10*l.* made in June, 1914, was also unpaid by them. In this state of things in March, 1915, the committee passed a resolution calling up the entire uncalled balances of the contributions of these two members alone, the reason alleged being their refusal to pay the previous calls, and the trouble and expense thereby incurred and likely to be incurred by the society:—

Held, assuming the committee had power under the articles in a proper case to make calls on certain members without making similar calls on the other members, that no sufficient reason had been shown for the exercise of that power against the two members in question, and that the resolution was invalid.

Quaere whether under the articles the committee had any power to make calls on certain members without making similar calls on other members.

MOTION.

The defendant society, which was formed for the purpose of

SARGANT J. 1915 GALLOWAY v. HALLÉ CONCERTS SOCIETY.

taking over the undertaking of the "Hallé Concerts" in Manchester, was incorporated in 1899 under the Companies Acts as a company limited by guarantee omitting, pursuant to licence of the Board of Trade, the word "Limited" as part of its name, on the usual condition that no portion of its income and property should be paid or transferred, directly or indirectly by way of dividend, or otherwise by way of profit, to its members.

The memorandum of association provided that every member should contribute to the assets, in the event of the society's being wound up, for payment of its debts, winding-up expenses, and the adjustment of the rights of the contributories among themselves, such amount as might be required not exceeding 5*l.*; and also that, if on winding up, after payment of all debts and liabilities, there remained any property, this should not belong to the members, but should be handed over to some kindred institution.

Clause 7 of the articles of association provided: "Each member shall be liable to contribute, and shall, when demanded, pay to the committee, any sum or sums, not exceeding in the aggregate the sum of 100*l.*, which is hereafter referred to as the contribution. The liability to the contribution shall be additional to and without prejudice to any liability in case of winding-up under the guarantee clause in the memorandum of association. The committee may from time to time make such calls as they think fit upon each member in respect of all moneys unpaid on his contributions, and each member shall pay the amount of every call so made upon him to the persons in the manner and at the times and places appointed by the committee."

Clause 8 provided: "A call shall be deemed to have been made at the time when the resolution of the committee authorizing such call was passed."

The plaintiffs, William Johnson Galloway and Oliver Standbrooke Holt, were members of the society, and for some time past had objected to its general policy, and in particular to certain calls on the members, one for 7*l.* and the other for 3*l.* They ultimately paid these calls, but as regards the call of 3*l.* only after proceedings had been taken in the county court. A third call for 10*l.* was made in June, 1914, which at the

date of the resolution next mentioned had not been paid by them.

Under these circumstances, on March 31, 1915, the committee passed the following resolution: "The secretary reported that there were certain guarantors who had not paid the call of 10*l.* made in June last. He desired especially to call attention to the cases of Mr. W. J. Galloway and Mr. O. S. Holt, who had refused to pay the call of 3*l.* made in June, 1913, and had even gone so far as to allow themselves to be sued in Court for the amount. As it was evident that they did not intend to pay the call of 10*l.* made in June, 1914, the society would have the trouble of again suing them for the amount, and it was resolved therefore that the sum of 80*l.* be called up in respect of the contribution of Mr. W. J. Galloway and 75*l.* in the case of Mr. O. S. Holt, respectively, payable at Williams Deacon's Bank, Limited, St. Ann's Street, on or before April 30, 1915. This amount to be in addition to the sum of 10*l.* owing in respect of the call made in June, 1914, and Mr. Dunderdale was instructed to take the necessary steps to recover these moneys."

These two sums of 80*l.* and 75*l.* represented the whole of the uncalled liability of the two plaintiffs. No similar call was made on the other members of the society.

In these circumstances the plaintiffs on May 5, 1915, issued the writ in this action, claiming (1.) a declaration that the resolution was invalid and ultra vires and that the calls made in pursuance thereof were not enforceable against the plaintiffs or either of them, and (2.) an injunction to restrain the society from enforcing or attempting to enforce by action at law or otherwise the said calls or either of them.

Shortly before or shortly after the issue of the writ the plaintiffs paid the calls of 10*l.*, and now moved for an interim injunction, but by consent the motion was treated as the trial of the action.

Clauson, K.C., and *W. R. Sheldon*, for the plaintiffs. So far as concerns the claim for an injunction it should perhaps be properly limited to proceedings other than proceedings in the High Court of Justice, but treating the motion as the trial of the

SARGANT J. 1915 GALLOWAY v. HALLÉ CONCERTS SOCIETY.

action the declaration claimed will be sufficient to establish the rights of the parties and it will not become necessary to grant any injunction. The plaintiffs' case is based on the broad proposition to be found in Lindley on Companies, 6th ed. p. 578: "The power of making a call must be exercised as a trust, so as not to oppress or favour one shareholder, or set of shareholders, more than another; and if a call, which ought to be made on all the shareholders rateably, is made on some of them exclusively of the others, redress may be had." In support of that proposition the learned author cites *Preston* v. *Grand Collier Dock Co.* (1), where Shadwell V.-C. said: "This Court never would allow the directors of a company so to proceed as to require some shareholders to pay a deposit and calls, and not to require others to make similar payments." It would be particularly unfair in the present case, since neither the memorandum nor the articles contain any provisions for repayment of the amount paid up in excess by one member in the event of the winding up of the company. It is suggested against us that the language of clause 7 of the articles of association in terms enables the committee to discriminate against any particular member, but we submit that clause 7 does not confer any such power. The words "each member" in that clause mean no more than "every member," and the word "each" is similarly used in Table A, art. 12; but, assuming such a power to exist, no sufficient case has been shown for its exercise. The only reason alleged is the reason stated in the resolution of March 31, 1915, and that is wholly insufficient. Under the circumstances the two calls now in question were not made bona fide, and the plaintiffs are entitled to the declaration claimed.

Cyril Atkinson, *K.C.*, and *A. F. Topham* (for *W. A. Greene*, serving with His Majesty's Forces), for the society. If the committee had power to make these calls under the articles the Court will not inquire into the circumstances under which they were made: Buckley on Companies, 9th ed. p. 570, where the learned author in a note to Table A, art. 12, says: "The Court will not in general take upon itself to investigate the

(1) (1840) 11 Sim. 327, 347.

propriety or necessity of a call." The only way of enforcing payment of these calls will be by action, and the arguments now urged on behalf of the plaintiffs will be open to them as defences to any such action. The present action is an attempt by the plaintiffs to anticipate any proceedings which the society may take.

[SARGANT J. referred to *Dyson* v. *Attorney-General* (1) as showing the plaintiffs' right to a declaration.]

There are really two points involved—first, whether the committee have power to make calls on some members only; and secondly, if so, whether a proper case has arisen for its exercise. As to the first point the language of clause 7 of the articles of association as a matter of construction clearly confers the power. That clause is a contract between the members and the committee and not merely between the members themselves. As to the second point the circumstances referred to in the resolution of March 31, 1915, amply justify the committee in making the two calls in question. The society will otherwise be put to continual trouble and expense in recovering repeated small calls for which the costs recoverable in the county court will prove an wholly inadequate indemnity. There appears to be no direct authority to show what is a sufficient reason for the exercise of such a power, but *Alexander* v. *Automatic Telephone Co.* (2), the facts in which, however, are quite different from the facts in the present case, is some authority to show what is not a sufficient reason. *Preston* v. *Grand Collier Dock Co.* (3) is distinguishable from the present case. The call there had been made on all the shares, but had not been enforced against persons who held certain shares in trust for the company. [They also cited *Allen* v. *Gold Reefs of West Africa.* (4)]

Clauson, K.C., in reply, referred to *British and American Trustee and Finance Co.* v. *Couper* (5), per Lord Macnaghten.

SARGANT J. This is a motion to restrain the defendants, the Hallé Concerts Society, from enforcing calls of 80*l.* and 75*l.*

(1) [1912] 1 Ch. 158.
(2) [1900] 2 Ch. 56.
(3) 11 Sim. 327.
(4) [1900] 1 Ch. 656.
(5) [1894] A. C. 399, 417.

SARGANT J. 1915 GALLOWAY v. HALLÉ CONCERTS SOCIETY.

respectively made on the plaintiffs William Johnson Galloway and Oliver Standbrooke Holt as members of the society. There might be some difficulty in granting an injunction exactly in accordance with the notice of motion because it might appear to be restraining persons from applying to the Courts of law, including the King's Bench Division of the High Court of Justice, for the purpose of enforcing their rights, and of course that is not possible since the Judicature Acts. But the parties desire to have the question finally determined before me to-day, and the writ asks for a declaration on the subject, that is to say, a declaration that the resolution passed by the committee of the society making these calls is invalid and ultra vires and that the calls are not enforceable against the plaintiffs or either of them. Therefore I can deal now with the whole question between the parties. [His Lordship stated the facts, referring to the memorandum of association and clauses 7 and 8 of the articles of association and the resolution of the committee of March 31, 1915, above set out, and continued :]

The question now arises whether the society is entitled to call up the full amount uncalled in respect of the contributions of the plaintiffs, while making no similar call in respect of the contributions of the other members of the society, for the reason that these two members have given trouble to the society in the past in securing and enforcing payment of the previous calls made by the society. It is contended on behalf of the society that there is power under the articles to make calls on particular members without making corresponding calls on the other members, and it is further contended that the present case is a proper case in which to exercise that power. I do not think that I need determine whether article 7 does or does not give power to make a call on one member without making a similar call on other members who are in exactly the same position with regard to the amount paid up in respect of their contributions. I do not see anything to prohibit it in the actual language of article 7, which was of course framed for the purpose of defining in this respect as well the relations between the members of the society and the committee as the relations between the members themselves. It may be that in a proper case such power may be exercised—there may

be such a case—but even on that assumption I am still left under the obligation of considering whether this is a proper case for its exercise. There is no doubt that prima facie, as was pointed out in the speech of Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper* (1), there is by virtue of the ordinary law of partnership an implied condition of equality between shareholders in a company, and that prima facie it is entirely improper for the directors to make a call on some members of a class of shareholders who stand in the same relation to the company as the other members of the class without making a similar call on all the other members of that class. The point was decided as long ago as the year 1840 in *Preston* v. *Grand Collier Dock Co.* (2), and that case is referred to with approval and taken as being the law by Lord Lindley in his book on Companies, 6th ed. p. 578. Is it right to make this call on these two persons alone for this large amount merely because they have been dilatory in the payment of previous calls? It is said that expense is caused to the society by the necessity of enforcing these repeated calls against them and that less expense will be caused if the amounts can be called up in a lump sum. In my opinion that is not a sufficient reason. So far as legal expenses are concerned those legal expenses can be recovered in the ordinary way, and I cannot think that the mere fact that letters have been written to the plaintiffs before the matter was put in the solicitor's hands for the purpose of taking proceedings is a sufficient reason for the course which has been adopted. In the present case the result might be more unfair to the plaintiffs than in an ordinary case, because, so far as I can see, in case of a winding up of the company there is no certainty at all under the memorandum of association that the sums of 80*l.* and 75*l.* in question would come back to the plaintiffs in priority to the payments that would have to be made to the other members of the society. However that may be, it seems to me that the reason given by the committee of the society for making the calls on these two persons separately from any similar calls on the other members of the society is altogether insufficient,

(1) [1894] A. C. 399, 417. (2) 11 Sim. 327.

SARGANT J
1915
GALLOWAY
v.
HALLÉ
CONCERTS
SOCIETY.

and accordingly I propose to make a declaration substantially to the effect claimed by the writ.

Clauson, K.C. I suggest that the words "and ultra vires" should be omitted from the declaration.

SARGANT J. Yes.

Solicitors: *Rawle, Johnstone & Co.; Dunderdale, Dehn & Co., for Dunderdale & Co., Manchester.*

A. C.

SARGANT J.
1915
June 22, 23.

In re LIMOND.
LIMOND *v.* CUNLIFFE.

[1915 L. 175.]

Will—Soldier—Actual Military Service—Attestation by Two Witnesses—Gift to One of Attesting Witnesses—Validity—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 11, 15.

Sect. 15 of the Wills Act, 1837, does not apply to a will made in exercise of the privilege reserved to soldiers and seamen under s. 11 of the same Act.

On the conclusion of the Waziristan operations on the frontier of India in 1895 a portion of the force remained in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier. The testator was a lieutenant in an Indian regiment forming part of this escort. While so serving the testator was mortally wounded by a fanatic and was carried into camp, where he dictated a will to his brother-in-law, whom he made his residuary legatee, and died on the next day. The will was signed by the testator and attested by his brother-in-law and another officer as witnesses. His estate consisted of personal property only:—

Held, that the testator was in "actual military service" within the meaning of s. 11 of the Wills Act, 1837, at the time when he made his will.

Held, also, that notwithstanding the attestation by two witnesses the will was a soldier's will made in exercise of the privilege reserved by s. 11 and requiring no attestation; that s. 15 of the Wills Act did not apply to a will so made; and that the gift to the attesting witness was therefore valid.

ADJOURNED SUMMONS.

The testator, Alexander Limond, a lieutenant in the Sixth Punjab Infantry, died on May 14, 1895, at Camp Boya, Tochi

Valley, Punjab, in the Empire of India, having been mortally wounded the day before by a fanatic at Camp Boya.

At the date of his death his regiment had taken part in the Waziristan operations, which for the purpose of the grant of the war medal were regarded by the Government of India to have ended on March 13, 1895. Upon the conclusion of the operations certain troops were left in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier and were styled "the Tochi Delimitation Escort," and the testator belonged to this escort. At the time when he was mortally wounded his regiment formed the rear and baggage guard of the column moving to Camp Boya.

He was carried into the camp, where before undergoing an operation he dictated a will to Captain Cunliffe, his brother-in-law. The testator signed the will and Captain Cunliffe and Major Mein signed their names as witnesses. The document was in words and figures following :—

"Last will and testament of Lieut. A. Limond 6th Punjaub Infantry.

"In the event of my death I wish my rifle to be given to my brother Rous my shot gun I leave to my nephew Robin to be in his father's charge till he comes of age And to my brother-in-law that is Captain Cunliffe I wish to be left and given any money that I have deposited at home also any money to my credit with regiment at Chowdri and the amount realised by the sale of any property I may have—my gold watch and chain I leave to my brother Rous and this watch I should like kept in the family—my war groups and photographic album I leave to my father—my set of gold studs I leave to my sister Kitty—and some knicknack to my sister Trix—and my trophy of arms to show I have not forgotten her and something to Aunt Clemence as a remembrance I appoint my brother-in-law Capt. E. W. Cunliffe and my brother Rous my executors

"Dated 13th May 1895.

"Camp Boya Tochi Valley.

"A. Limond Lt. 6th P. I.

"J. E. Mein Major Commandant 6th P. I.
"E. W. Cunliffe Capt. 6th P. I. } Witnesses."

SARGANT J. 1915 LIMOND, *In re.* LIMOND v. CUNLIFFE.

The following writing was also made and signed by Major Mein :—

"Certified that the will over page was dictated by Lieutenant A. Limond 6th Punjab Infantry when he was brought into camp after having been dangerously wounded and immediately it was known an operation was about to be performed. He particularly requested that Captain Cunliffe should write to his dictation, and owing to the exceeding emergency of the case I was unable to look up regulations regarding wills and witnessing of signatures.

"J. E. Mein Major
"Commandant 6th Punjab Infantry."

Captain Cunliffe wrote a letter to his father-in-law, General Limond, dated May 15, 1895, describing the event, in which occurred the following passage :—"Alex. said with bitter regret 'Oh if my revolver had only been loaded!' He had omitted to load it before marching, but as a matter of fact, I don't suppose that one out of ten officers' revolvers were loaded that morning, as we are now not supposed to be on service, but in a friendly valley which we have occupied at the request of its inhabitants. Before the operation began Alex. asked me to write a rough will and to call Major Mein to witness and hear it dictated."

In answer to recent inquiries, Major (now Colonel) Mein wrote a letter dated June 18, 1914 : "Lieut. A. Limond was my adjutant and the regiment was one of a brigade sent to open up and occupy the Tochi Valley in Feb., 1895 ; and the day Lieut. Limond was stabbed the regiment formed the rear and baggage guard of the column moving to Camp Boya. The regiment at the time was on active service beyond the border and the will was a soldier's will. Seeing he was in a precarious condition when brought into camp I asked him if he had made a will. On his replying in the negative, I said, 'If you wish to make one and feel equal to dictating, you can make a soldier's will in the presence of two witnesses, one of whom will write down what you say.' He did so in the presence of myself and Capt. Cunliffe. I might add that Lieut. Limond was stabbed at the end of the

march and only about 200 or 300 yards from camp, so was carried in on a dhuli and attended to at once, and was in full possession of his senses when he dictated his will."

In answer to similar inquiries the Assistant Military Secretary wrote from the India Office, Whitehall, a letter dated December 7, 1914: "I am directed to inform you that Lieut. A. Limond 6th Punjab Infantry was mortally wounded by a fanatic at Camp Boya Tochi Valley on 14 May 1895. He had taken part in the Waziristan operations which for the purpose of the grant of the war medal were regarded as having ended on the 13th March 1895. Certain troops were however left in the Tochi Valley as an escort to the delimitation party and were styled the 'Tochi Delimitation Escort' and it was to this escort that Lieut. Limond belonged at his death. The question whether he was at the time 'on active service' or actual military service within the meaning of the statute dealing with soldiers' wills is a legal point on which this department cannot offer an opinion, but a memorandum on the subject by the Judge Advocate General is enclosed for your information."

The memorandum was as follows: "The circumstances are not stated in sufficient detail to enable me to express a definite opinion, but it would appear that a military expedition was sent into a hostile district to effect certain purposes, among others the delimitation of a frontier. After the main objects of the expedition had been effected it was necessary to leave a military escort to secure the safe performance of the delimitation. It would seem that in a country of this kind, which had recently been the scene of hostilities, attacks of one kind or another upon the party would be probable. If I am right in the above assumptions as to the facts the members of the escort would be 'in actual military service' at the time within the meaning of the Act."

The testator's property apart from personal belongings consisted almost entirely of certain reversionary interests in personal estate, and his will was not proved in the United Kingdom until one of these interests had fallen into possession, when, on December 19, 1914, administration with the will annexed was granted to Margaret Springall Limond upon an affidavit of due

SARGANT J. 1915 LIMOND, *In re.* LIMOND *v.* CUNLIFFE.

execution by Colonel Mein, the surviving witness. The gross value of the estate was 948*l.* 2*s.* 4*d.*

Captain Cunliffe died in 1911, having married a second wife, whom he appointed his sole executrix.

This originating summons was taken out by Margaret Springall Limond as plaintiff against the executrix of Captain Cunliffe and persons claiming under the next of kin of the testator as defendants for the determination (inter alia) of the question whether the gifts contained in the will to Captain Cunliffe were valid.

Two points, which were argued separately, were raised: (1.) whether the testator when he made his will was "in actual military service" within the meaning of s. 11 of the Wills Act, 1837; and (2.) if so, whether, having regard to the fact that the will had been attested by two witnesses, the gift to Captain Cunliffe as one of those witnesses was rendered void by s. 15 of the Wills Act, 1837. (1)

F. Whinney, for the plaintiff.

Wright Taylor, for Mrs. Cunliffe. The testator was engaged in "actual military service" within the meaning of s. 11 at the date of his will and death. That expression must be taken to cover the return of the force after the actual fighting was over. Moreover the testator was still serving with the escort which remained with the delimitation party, and the portion of the force so retained

(1) Wills Act, 1837, s. 11: "Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

Sect. 15: "And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

was in a different position from that of the rest of the force. The delimitation of the frontier was an incident of the campaign. The privilege reserved by s. 11 has been held to apply to the will of a surgeon in the Navy invalided at a foreign station and returning home on board a passenger ship: *In the Goods of Saunders* (1), following *Herbert* v. *Herbert.* (2) See too *In the Goods of Tweedale* (3), where Sir J. Hannen held that alterations in a soldier's will were deemed to have been made during actual military service. Similarly as to the commencement of the service, the step of going into barracks with a view to be drafted to the seat of war was held sufficient to bring the will of a private in a volunteer battalion who had volunteered for service in the South African war within the exemption: *In the Goods of Hiscock.* (4) In *Gattward* v. *Knee* (5) Sir Francis Jeune P. said: "I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of that which in Roman law was expressed by the words 'in expeditione.' These words meant something more than the English words 'on an expedition,' because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be in expeditione." Those observations are just as applicable to the conclusion of the operations, which for this purpose is not to be fixed by the mere cessation of actual fighting.

D. M. Robertson-Macdonald, for the persons claiming under the next of kin. The testator was not engaged in "actual military service" when he made his will. The expedition had come to an end two months previously on March 13, as appears from the letter from the India Office, and in the letter written by Captain Cunliffe at the time he speaks of the Tochi Valley as a "friendly valley." The fact that the testator was attached to the Tochi delimitation escort does not alter the case. There must be a state of war existing to constitute actual military service within the meaning of s. 11, and that condition is recognized by Sir Francis Jeune in his judgment in *Gattward* v. *Knee.* (5)

(1) (1865) L. R. 1 P. & M. 16.
(2) (1855) Deane's Rep. 11.
(3) (1874) L. R. 3 P. & M. 204.
(4) [1901] P. 78.
(5) [1902] P. 99, 102.

SARGANT J. 1915 LIMOND, *In re.* LIMOND *v.* CUNLIFFE.

SARGANT J. For the purpose of determining the first question on this summons it is necessary or may be necessary to determine whether the deceased was in "actual military service" within s. 11 of the Wills Act, 1837.

The facts are precisely stated in a letter from the India Office dated December 7, 1914. [His Lordship read the letter of that date down to the words "legal point" and continued.] It has been held in various cases that, for the purpose of determining whether a soldier is in actual military service, the commencement of the military service is the time when the mobilization takes place. In the same way it seems to me that the actual military service does not cease until the full conclusion of the operations. In the case of a great part of the force engaged it may be that the actual military service ceased on March 13, 1895, which was the date chosen for the purpose of the grant of the war medal, although I cannot help thinking that for the present purpose, even as regards the great bulk of the force, the service would be down to a somewhat later date. But, in the case of this particular force which formed part of the expedition, it remained as an escort to the delimitation party, that is to say, to the party engaged in the delimitation of the frontier, which was an operation incident to the war in question. In order that final terms of peace might be ascertained it was no doubt necessary that there should be some delimitation of the frontier, and for the purpose of effecting that delimitation a party of engineers would be told off and a portion of the force which had been fighting was retained to act as escort. In my opinion any members of that escort who were so retained had not finished the expedition on which they had been sent and were in actual military service.

The second point was then argued.

Wright Taylor, for Mrs. Cunliffe. The second point is whether the disqualification of an attesting witness under s. 15 applies to a soldier's will. Sect. 11 of the Wills Act, 1837, leaves the validity of a soldier's will of personal estate to be determined by the old law. That throws it back to the Statute of Frauds, 29 Car. 2, c. 3, which by s. 5 required a will of lands to be

attested and subscribed by three or four credible witnesses, and by s. 19 required a nuncupative will to be proved by the oaths of three witnesses (at the least) that were present at the making thereof, together with a number of other strict restrictions, but s. 23 (1) contained a similar exemption in favour of soldiers and sailors to that contained in s. 15 of the Wills Act, 1837. The execution of a soldier's will of personal estate therefore depends on the law prior to the Statute of Frauds, under which no attestation at all was required: Swinburne on Testaments, 7th ed. vol. i. p. 94. To a will so made in exercise of the privilege reserved to a soldier in actual military service s. 15 of the Wills Act, 1837, has no application, and where attestation is not required no disability attaches to the witness taking a benefit. Where attestation is required it is true that a supernumerary witness has been held to be disqualified, but evidence is admissible to show in what character he signed, and if he did not sign as a witness his signature may be omitted from the probate: Jarman on Wills, 6th ed. vol. i. p. 94.

D. M. Robertson-Macdonald, for the persons claiming under the next of kin. The gifts to Captain Cunliffe are void under s. 15 of the Wills Act, 1837. In *Lees* v. *Summersgill* (2) Sir W. Grant M.R. decided that a gift to an attesting witness of a will in writing of personal estate, which required no attestation under the Statute of Frauds, was void under 25 Geo. 2, c. 6, s. 1 (which was to the same effect as s. 15 of the Wills Act, 1837); and, though it was afterwards held that the statute in question did not apply to wills of personal estate,—*Foster* v. *Banbury* (3); *Emanuel* v. *Constable* (4)—still, in the case of a will of real estate which did require attestation under the Statute of Frauds, it was held that the statute 25 Geo. 2 c. 6, s. 1, rendered void a gift to a supernumerary witness *Doe* v. *Mills*. (5) Similarly under the Wills Act, 1837, which by s. 9 requires attestation by two witnesses, a gift to

(1) Statute of Frauds, s. 23: "Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this Act."

(2) (1811) 17 Ves. 508.

(3) (1829) 3 Sim. 40.

(4) (1827) 3 Russ. 436.

(5) (1833, 1834) 1 Moo. & R. 288.

SARGANT J. 1915 LIMOND, *In re.* LIMOND *v.* CUNLIFFE.

a third or supernumerary witness is rendered void by s. 15: *Randfield* v. *Randfield* (1); *Wigan* v. *Rowlands*. (2) There is no reason why the principle of these decisions should not apply to a soldier's will for the due execution of which no attestation is required. It might be different if the gift to the superfluous witness had the effect of rendering the will itself void, but s. 15 is a disqualification of the legatee, not of the testator. Moreover I submit that the will in the present case is not a soldier's will at all, but was intended by the testator to be a will attested by two witnesses in the ordinary way, and, if so, the Court will give effect to his intention: *Scott* v. *Rhodes*. (3) [He also referred to Bacon's Abridgment, 7th ed. vol. viii. p. 440, as to the requirements of a mere nuncupative will; Roper on Legacies, 4th ed. p. 28; and Manual of Military Law (1914), p. 214.]

Wright Taylor in reply. The authorities cited have no application to a soldier's will of personal estate, which requires no attestation at all. The testator intended his will to be a soldier's will, but, whether he intended it or not, the privilege conferred by s. 11 would still exist. Sect. 15 has no application to a will made in exercise of the privilege conferred by s. 11 and is limited in its operation to wills the mode of execution of which is provided for by s. 9 of the Wills Act.

SARGANT J. Having come to the conclusion that the testator in this case died when in actual military service, I have now to consider the question whether a bequest of residuary personalty to a person who did in fact witness his will is bad under the Wills Act, 1837. The Wills Act, s. 11, contains a proviso in these terms: [His Lordship read the section and continued.] This is in fact carrying on a similar exemption or privilege to that contained in s. 23 of the Statute of Frauds. Here the will in question was in fact executed in the presence of two witnesses who were present at the same time and who signed as witnesses in the presence of the testator, so that the will was a will which would have been good independently of the privilege given by

(1) (1863) 32 L. J. (Ch.) 668. (2) (1853) 11 Hare, 157.
(3) (1809) 1 Phill. 12, 19.

s. 11 of the Wills Act; but on the other hand it seems to me reasonably clear from the evidence that that was really a matter of chance or coincidence, and that what the testator was intending to do was to make a soldier's will. In Colonel Mein's account of the transaction as contained in the letter of June 18, 1914, he says this: [His Lordship read the letter of that date above set out and continued.] And in a letter of May 15, 1895, which was written to his father-in-law, General Limond, by Captain Cunliffe, the writer says this: "Before the operation began Alex. asked me to write a rough will and to call Major Mein to witness and hear it dictated." I think, therefore, that, although in fact the will does fulfil the requirements of the Wills Act, still it was intended to be made as a soldier's will and is entitled to the privilege reserved by s. 11.

That being so, the question arises whether there is a disqualification under s. 15 of the Wills Act. That section is as follows: [His Lordship read the section and continued.] The mere fact that witnesses are supernumerary witnesses does not save them from the disqualification under s. 15, if in fact they are attesting a will which is executed under the affirmative provisions of the Wills Act, 1837. That is rendered clear by a succession of cases beginning with *Doe* v. *Mills* (1), which was a case under 25 Geo. 2, c. 6, and followed by *Wigan* v. *Rowlands* (2) and *Randfield* v. *Randfield*. (3) So that the mere fact that the attestation of this will by these two witnesses was superfluous, inasmuch as the testator was in actual military service and availing himself of the privilege of s. 11, would not be sufficient to free the witnesses from the disqualification under s. 15, if s. 15 does in fact apply at all to s. 11. In my opinion, however, s. 15 does not so apply. It seems to me on the true reading of the statute that the disqualification introduced by s. 15 applies to witnesses who are attesting the execution of a will under the preceding provisions of the statute, that is to say, in particular s. 9, which provides that a will shall be executed in the presence of two witnesses who are to sign as witnesses in the presence of each other and in the presence of the testator.

(1) 1 Moo. & R. 288. (2) 11 Hare, 157.
(3) 32 L. J. (Ch.) 668.

SARGANT J.
1915
LIMOND, *In re.*
LIMOND *v.* CUNLIFFE.

Authority for so limiting general language such as that in s. 15 of the Wills Act may be found in an important decision under the analogous provisions of the 25 Geo. 2, c. 6, an Act which was passed to mitigate a hardship which was found to have been caused by the Statute of Frauds, namely, that a will of real estate was liable to fail altogether if one of the three necessary witnesses to it was expressed to take a benefit under it. The language of the 25 Geo. 2, c. 6, was general, and there were for some time conflicting decisions as to whether the statute applied to real estate only or to personal estate as well, but this conflict was ultimately determined by the case of *Emanuel* v. *Constable* (1), which decided that the statute did not extend to wills of personal estate. In that case the Master of the Rolls says this (2): "The avowed purpose of this statute, therefore, is to remove doubts which had arisen with respect to the persons who were to be deemed good witnesses within the intent of the Statute of Frauds, which required three or four witnesses to a will of lands; and the mischief to be avoided was, the admission of witnesses to such a will, who were interested to support the will. When this statute, therefore, proceeds to enact 'that, if any person shall attest the execution of any will or codicil, who shall have a gift by the will or codicil, such gift shall be void,' it is a reasonable construction to say, that the Legislature must be understood here to be speaking of *such* wills or codicils as by the Statute of Frauds require to be attested by witnesses; and the indefinite words 'any will or codicil,' may reasonably be read 'any such will or codicil,' unless it should appear from other parts of the statute, that the Legislature intended to give the words 'any will or codicil' their most extended and indefinite meaning."

Here in the same way it seems to me, that although s. 15 speaks in the broadest terms of the attestation of the execution of any will, it is really only dealing with the attestation of the execution of a will under the provisions of the Act itself, and that the proviso in s. 11 which leaves the wills of soldiers in actual military service on their former footing, that is to say, without the necessity of any attestation at all, prevents the application to

(1) 3 Russ. 436. (2) 3 Russ. 439.

those wills both of the requirements of s. 9 and of the disqualifications of s. 15. In saying that I bear in mind that the disqualification under s. 15 is not a disqualification of the testator but a disqualification of the legatee, and to that extent I cannot find any argument in s. 15 itself for saying that it should not apply to the wills of soldiers under s. 11. The governing consideration to my mind is that s. 15 on the true general view of the statute deals with the execution and attestation of wills under the provisions of the statute itself and is not dealing with the subject-matter of soldiers' and sailors' wills, which in my opinion are left entirely unaffected in respect of execution and attestation by the provisions of the Act.

I therefore answer the question raised by the summons by declaring that the gifts contained in the will to Captain Cunliffe are valid so far as they relate to personal estate.

Solicitors: *Francis Voules & Co.; Emmet & Co., for Whateley Bowling, Southsea; Mount, Sterry & Wheeler.*

A. C.

C. A.
EVE J.
1914
Dec. 15, 16, 21.
1915
C. A.
May 4.

In re SOUTH EASTERN RAILWAY COMPANY AND LONDON COUNTY COUNCIL'S CONTRACT.

SOUTH EASTERN RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL.

[1914 S. 3870.]

Vendor and Purchaser—Compulsory Purchase—Street widening—Arbitration—Award—Construction—Alternative Findings—Test of Value—Increment Value on taking of Frontage Strip—Betterment—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

Where an owner of two contiguous pieces of land forming an area suitable, and it may be best suited, for development and use as one building site sells under compulsion a part of one piece as a part of that piece and without any reference to his interest in the other piece, the purchase price for the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece, and is not to be ascertained by deducting the value of what is left to the owner of the two pieces after the sale from their aggregate value immediately prior to the sale.

A railway company which was seised in fee of property in London bounded on the north by the Strand and on the east by Craven Street received notice to treat for a portion of this property from the London County Council for the purpose of widening the street. By a contract made in 1912, which superseded this notice, the company agreed to sell to the Council a piece of land forming part of Nos. 9 and 10, West Strand, at the back of which were Nos. 1 to 7, Craven Street. The Council covenanted to execute all necessary road making so as to give the remainder of Nos. 9 and 10, Strand a frontage to the Strand as widened. The purchase-money and compensation were to be determined by an arbitrator, and by his award he awarded the sum of 18,330*l.* by way of purchase-money, and nothing beyond for compensation. By way of addenda he declared that in arriving at this sum he had had regard solely to the value of the estate and interest in the said land contracted to be sold, but that if the true measure of the purchase-money and compensation were the difference between the value of the Strand and Craven Street land before the giving of the notice and the aggregate value of the said lands after the taking of the frontage strip, he found that the amount of purchase-money and compensation would be 3465*l.* In an action by the vendors for the specific performance of the agreement:—

Held by Eve J. and the Court of Appeal, that the contract being one for the sale and purchase of a part of the vendor's property known as Nos. 9 and 10, Strand, and not a contract for the sale of a part of the

entire site, the arbitrator was justified in treating the vendors as though they were the owners of Nos. 9 and 10 only, and there must be judgment for specific performance of the agreement on the footing that 18,330*l.* was the purchase price.

THIS was an action for the specific performance of a contract between the South Eastern Railway Company as vendors and the London County Council as purchasers. The railway company wished to acquire Nos. 9 and 10, Strand, and obtained parliamentary powers for that purpose, contained in their Act of 1900. At that time the railway company were owners of property in Craven Street adjoining 9 and 10, Strand and lying towards, if not quite up to, the Thames Embankment. The Act of 1900 provided in s. 20, sub-s. 3: "The South Eastern Company shall if required by the London County Council for the widening and improvement of Craven Street and the Strand sell to the London County Council all their estate and interest in the properties numbered on the deposited plans 72 and 73 in the parish of St. Martin-in-the-Fields"—that is, Nos. 9 and 10, Strand—"and the South Eastern Company shall before granting any new lease or tenancy of or in either of the said properties give to the London County Council the option of purchasing the same such option to be exercised within twelve months before the expiration of the existing lease or tenancy."

The following statement of facts is taken from the judgment of Eve J.:—

At the date of the contract hereafter stated the railway company was seised in fee of a piece of land in the county of London, bounded on the north by the Strand and on the East by Craven Street, whereon were erected and standing two messuages and shops fronting on the Strand and known as Nos. 9 and 10, Strand, and several messuages and dwelling-houses fronting on Craven Street, and distinguished by the numbers 1 to 7 in that street. The company had been attempting to dispose of all the hereditaments and premises as a building site in one or more lots.

By the contract, which was dated November 9, 1912, the railway company agreed to sell and the London County Council agreed to purchase "All that piece of land and premises now

C. A. 1915 SOUTH EASTERN RAILWAY AND LONDON COUNTY COUNCIL'S CONTRACT, *In re.* SOUTH EASTERN RAILWAY *v.* LONDON COUNTY COUNCIL.

forming part of Nos. 9 and 10 West Strand in the parish of St. Martin-in-the-Fields in the county of London as more particularly delineated and shown by red colour on the plan hereto annexed, together with all such estate and interest as the vendors have in the vaults or cellars at present existing under such portions of the Strand and Craven Street as abut on the said land coloured red"; and under clause 11, in the events which happened, the purchase-money and compensation payable by the Council fell to be determined by an arbitrator in an arbitration to which it was stipulated that all the provisions of the Lands Clauses Consolidation Acts should apply. The purchase was made by the Council for the widening of the Strand, and accordingly they covenanted as and when vacant possession of the land contracted to be sold, or part thereof, was given to them to execute all necessary road making and paving works "so as to give the remainder of the property now known as Nos. 9 and 10 West Strand a frontage to the Strand as widened." The contract also contained provisions under which the vendors were to retain possession of the land after completion, and were to be allowed to utilize it for business purposes until actually required by the Council for the widening, they paying 4*l.* per cent. interest on the purchase-money and compensation, and it was stipulated that the arbitrator should take into account "all the provisions of this agreement in favour of the vendors, and particularly the retention by the vendors of the land contracted to be sold after payment of the purchase-money and compensation, and the facilities to be afforded to the vendors for the erection of temporary shops, and all the circumstances of the case."

The arbitrator was duly appointed, and by his award, dated April 20, 1914, he awarded the sum of 18,330*l.* by way of purchase-money, and nothing beyond by way of compensation. By way of addenda to his award he first declared that in arriving at the sum so awarded he had had regard solely o the value of the estate and interest contracted to be sold by the railway company in the said land, and to the circumstances of the case so far as they related to the said land, and to the residue of the properties known as Nos. 9 and 10, Strand, and then he went on to enumerate certain findings of fact relating to the railway

company's interest in the land in the rear of Nos. 9 and 10, Strand, forming the site of Nos. 1 to 7, Craven Street, their dealings therewith, and the increment in the value thereof due to the taking by the Council of the frontage strip. He concluded with this paragraph (paragraph 7): "If the true measure of the purchase-money and compensation so to be paid by the Council as aforesaid were the difference between the aggregate value of the Strand land and the Craven Street land before the giving of the said notice"—that was the notice to treat, which was afterwards superseded by the contract—"and the aggregate value of the said lands after the taking of the frontage strip, I find that the amount of such purchase-money and compensation would be 3465*l.*"

On July 29, 1914, a summons was taken out by the vendors asking that it might be declared that the purchase-money to be paid under the contract was 18,330*l.*, and that this sum should be stated in the conveyance. On the summons being opened a preliminary objection was taken by the purchasers that the question at issue could not be determined by a vendor and purchaser summons, and at the suggestion of the Court a writ in an action was issued by the vendors claiming specific performance of the agreement on the footing that 18,330*l.* was the purchase price.

The Strand land and the Craven Street land were capable of being dealt with as one building site and in 1910 were advertised for sale with other lands of the company in one or more lots. Subsequently to the giving of the notice of March 17 the Strand and Craven Street lands were demised to one lessee for 999 years. It was also in evidence that the value per square foot of the Strand land was greater than the value per square foot of the Craven Street land.

The summons and action came on for hearing before Eve J. on December 15, 1914.

Freeman, K.C., *Percy Wheeler*, and *Joshua Scholefield*, for the vendors. This is a good award and a good contract. The finding of 18,330*l.* by the arbitrator is made upon the true basis as there stated. The facts set out afterwards are by way of

C. A. 1915 — SOUTH EASTERN RAILWAY AND LONDON COUNTY COUNCIL'S CONTRACT, *In re.* SOUTH EASTERN RAILWAY *v.* LONDON COUNTY COUNCIL.

addenda, and form no real part of the award. The points to be determined on the award were (1.) the value of the portion of these two houses Nos. 9 and 10, West Strand, and (2.) the damages or compensation in respect of these pieces of land in consequence of being severed from the rest of the land. The enhanced value of the land at the back of Nos. 9 and 10 when the front was pushed back from the Strand cannot be set off against the actual value of the land taken: Lord Halsbury's Laws of England, vol. vi. pp. 42 and 43. The value of the land pure and simple must be considered: *Eagle* v. *Charing Cross Ry. Co.* (1); *Eden* v. *North Eastern Ry. Co.* (2) The arbitration is in accordance with the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 49 and 63, and damages or compensation may be given for severance, or for other injurious affection of the land: *Holt* v. *Gas Light and Coke Co.* (3); *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (4); *Harding* v. *Board of Land and Works* (5); *Senior* v. *Metropolitan Ry. Co.* (6) Our submission is that the second part of the award contained an irrelevant and wholly unnecessary finding which the Court is entitled to disregard, and effect can be given to the true finding of 18,330*l.* as the purchase price of the property sold.

Morten, K.C., *Maugham*, K.C., and *Boydell Houghton*, for the purchasers. The whole of this property belonging to the vendors in the Strand and Craven Street was one site suited and intended for building purposes, and that fact had to be taken into consideration by the arbitrator in making his award. He has shut his eyes to this circumstance, and the principle upon which the arbitration proceeded was therefore wrong. The value of the whole site in the Strand and Craven Street should have been considered and then the value of what was left to the vendors after the sale deducted from the total value of the whole before the sale. In that way the correct figure for compensation in respect of the part sold would be arrived at. We say that this is an alternative award. Having regard to the fact

(1) (1867) L. R. 2 C. P. 638.
(2) [1907] A. C. 400.
(3) (1872) L. R. 7 Q. B. 728.
(4) (1887) 12 App. Cas. 315.
(5) (1886) 11 App. Cas. 208.
(6) (1863) 2 H. & C. 258.

that the frontage to the Strand was pushed back by the proposed improvement, the back land was enhanced in value to the vendors, and the price of the portion taken as a part of the whole site was thus reduced to 3500*l.* The question is what is the value to the owners of the strip taken, having regard to that which was left. It is not the market value which is to be considered, but the value to the owner whose property is being taken. That is the true principle upon which the value is to be assessed. It is not the sentimental value, but the site value: *Stebbing* v. *Metropolitan Board of Works* (1); *In re City and South London Ry. Co. and St. Mary Woolnoth and St. Mary Woolchurch Haw* (2); *Corrie* v. *MacDermott.* (3) The case of *Eagle* v. *Charing Cross Ry. Co.* (4), relied upon by the plaintiff, is really in our favour, and *Eden* v. *North Eastern Ry. Co.* (5) is distinguishable. The smaller sum of 3465*l.* is therefore the purchase price.

Freeman, K.C., in reply. The propositions of the defendants (1.) that the Strand and Craven Street lands are to be regarded as one and (2.) that the value of the property is to be such as will afford an indemnity to the owner are both untenable. There is no mention in the agreement of any property at all except Nos. 9 and 10, Strand. It is difficult to see how the value of the same property can change by the amount of 15,000*l.* by reason of its being on the lands of A. or B. The true principle of valuation is laid down in *Stebbing* v. *Metropolitan Board of Works.* (1)

Cur. adv. vult.

1914. Dec. 21. EVE J. In this action for specific performance the only point in dispute between the parties is the amount of the purchase price to be paid for the property the subject-matter of the contract. [His Lordship stated the facts and the terms of the contract and continued:] I pause here to express my opinion that according to its true construction the contract is one for the sale and purchase of a part of the vendors' property known as Nos. 9 and 10, Strand, and nothing beyond; it is not a

(1) (1870) L. R. 6 Q. B. 37, 45, 46.
(2) [1903] 2 K. B. 728.
(3) [1914] A. C. 1056.
(4) L. R. 2 C. P. 638.
(5) [1907] A. C. 400.

C. A. 1915

SOUTH EASTERN RAILWAY AND LONDON COUNTY COUNCIL'S CONTRACT, *In re.* SOUTH EASTERN RAILWAY *v.* LONDON COUNTY COUNCIL.

Eve J.

contract for the sale and purchase of a part of the entire site. [His Lordship then stated the terms of the award.]

The company claim that the purchase price to be paid by the Council is 18,330*l.*; the Council, on the other hand, insist that 3465*l.*, and no more, is payable.

The case has been exhaustively argued, as befits one affecting a large sum of money, and involving, as I am told, a question of principle in circumstances of not infrequent occurrence.

Having regard to the construction I have placed upon the contract, the question in issue may perhaps be adequately stated in the following terms. In ascertaining the purchase price to be paid for the land contracted to be sold, was the arbitrator justified in treating the vendors as though they were the owners of Nos. 9 and 10 only, or ought he to have had regard to the fact that they were owners also of the land in the rear of these premises?

In considering this question it is material to note that the arbitrator has negatived any liability on the part of the purchasers to pay compensation, having, as I conclude, formed the opinion that the provisions of the contract in favour of the vendors already mentioned constitute an adequate set-off to any claim for damages arising from severance or for other injurious affection. From this it results that the matter resolves itself into an inquiry as to the mode in which the amount to be paid as purchase-money is to be ascertained.

In answering such inquiry the following propositions may, I think, be treated as established by authorities binding on this Court: (1.) The value to be ascertained is the value to the vendor, not its value to the purchaser; (2.) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3.) market price is not a conclusive test of real value; (4.) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded; (5.) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6.) the true contractual relation of the parties—that of purchaser

and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified.

In my opinion no authority establishes the proposition contended for in this case by the Council; but this is not the same thing as saying that it cannot be established, and it is necessary to examine and see what would be the consequences in practice of adopting the views put forward on their behalf. It happens here that the interest and estate of the railway company in the Strand premises and in the land at the rear is identical—they are beneficial owners in fee of both pieces of land; but if the Council be right the principle for which they contend would be applicable to all cases in which any interest in contiguous land could be imported into the calculation, and the arbitrator, or it may be the jury, before being able to come to a decision, would have to embark on an inquiry as to the nature of such interest, and in what manner and to what extent, if at all, it depreciated in the hands of the particular vendor, as compared with one who had no such interest, the value of the land forming the subject-matter of the contract.

This would not only be highly inconvenient and tend greatly to increasing the difficulties and expense attendant on these transactions, but it would bring about some startling results; the most obvious one being that it would upset all uniformity of value, inasmuch as the value of the identical piece of land in the hands of one vendor might be assessed at many times its value in the hands of another, and this, not from any intrinsic distinction, but by reason solely of extraneous considerations. Moreover, it would be calculated to work injustice in that a vendor compelled to sell, and who the Legislature intended should be compensated for being compelled to sell, might have to accept from the undertakers a price far less than he would have obtained from any other purchaser, and out of all proportion to the true value of the land had it been ascertained without reference to the fortuitous circumstances of his being also interested in the contiguous land.

In my opinion, these considerations demonstrate the impossibility of acceding to the arguments urged on behalf of

C. A. 1915 SOUTH EASTERN RAILWAY AND LONDON COUNTY COUNCIL'S CONTRACT, *In re.* SOUTH EASTERN RAILWAY *v.* LONDON COUNTY COUNCIL. Eve J.

the Council, and I must uphold the contention of the railway company and fix the purchase price at the higher of the two amounts mentioned in the award. I might perhaps epitomize my judgment as follows: Where an owner of two contiguous pieces of land forming an area suited, and it may be best suited, for development and use as one building site sells under compulsion a part of one piece as a part of that piece, and without any reference to his interest in the other piece, the purchase price for the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece and is not to be ascertained by deducting the value of what is left to the vendor of the two pieces after the sale from their aggregate value immediately prior to the sale. The order will be made in the action as well as in the summons, and there will be judgment for specific performance on the footing that 18,330*l.* is the purchase price. The Council must pay the costs of these proceedings.

G. M.

C. A.

The plaintiffs appealed. The appeal was heard on May 4, 1915.

Morten, K.C., Maugham, K.C., and *Boydell Houghton*, for the appellants, made use of the same arguments as those advanced in the Court below, and also referred to *White* v. *Commissioners of H.M. Works and Public Buildings* (1) and *In re Bidder and North Staffordshire Ry. Co.* (2)

Freeman, K.C., Percy Wheeler, and *Joshua Scholefield*, for the vendors, relied on the same arguments as they used in the Court below.

Morten, K.C., in reply.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Eve J., and it raises questions involving a considerable amount of money between the London County Council and the South Eastern Railway Company. It is desirable, I think, to go back a little and to see how the various persons interested in the

(1) (1870) 22 L. T. 591. (2) (1878) 4 Q. B. D. 412.

property derive their title. [His Lordship stated the facts and proceeded.]

Now it will be observed that whether you look to the Act of Parliament, whether you look to the agreement, or whether you look to the document which followed this, namely, the appointment of the arbitrator pursuant to the agreement, the only property which is mentioned is Nos. 9 and 10, Strand. It was not the entirety, but a portion of Nos. 9 and 10, Strand. There is no reference whatever to the Craven Street property. What the arbitrator has done is this: he has taken the property coloured on this plan, the portion of Nos. 9 and 10, Strand which is by the agreement to be thrown into the Strand for the purpose of widening it; he has done that which he was told to do, and he has ascertained what is the purchase-money of this land, and he finds that it is 18,330*l.* Why is not that payable? I have listened attentively and I cannot see any ground whatever why that should not be payable. It is said: "Oh, but just look at the advantage which this other property will get. The remaining unsold parts of Nos. 9 and 10, Strand will really get a frontage to the Strand as widened, and if you look at the fact that the South Eastern Railway Company owns the Craven Street property, Nos. 1 to 7, which is sometimes spoken of as the back property or the rear property, you really will see that it is not fair that the railway company should get the purchase-money for this property without having regard to the fact that all that is taken from the railway company is a comparatively small strip of a property which is of great depth and extends over a very considerable distance down Craven Street." As I have said, what has that to do with it? Nos. 1, 2, 3, 4, 5, 6 and 7, Craven Street are not referred to anywhere in the Act of Parliament, in the agreement for sale, or in the appointment of the arbitrator. It seems to me it would be altogether unreasonable to say that there is any analogy between a case like this and a case where you are dealing with a small strip in front of one property, one house—to say that that has any relation whatever to a case like the present, where as a matter of fact it so happens that the vendor has a considerable stretch of property at the rear which may be benefited by the widening of the Strand and

C. A. 1915 — SOUTH EASTERN RAILWAY AND LONDON COUNTY COUNCIL'S CONTRACT, *In re.* SOUTH EASTERN RAILWAY *v.* LONDON COUNTY COUNCIL. — Lord Cozens-Hardy M.R.

the new frontage which he will get. We are asked to say that there is a difference to be made in the purchase-money of part of Nos. 9 and 10, Strand by reason of the fact that it is really part of a larger property owned by the vendors. I am entirely unable to agree to that. I cannot follow that argument at all. I think Eve J. arrived at an entirely right conclusion on this case, and that it is impossible to impeach his decision.

Another point of view which strikes me rather strongly is this. It is said that property with a frontage towards the Strand is worth seven times the value of property in Craven Street, and that the effect of this change when the Strand is widened will be that the railway company will make a considerable profit on the Craven Street property; that it will give Strand frontage value to a portion of the Craven Street property. If that is not betterment, I do not know what it is. I think it is quite clear that there is no provision in this Act for taking betterment into consideration. All that had to be considered was what is the purchase-money for this portion of Nos. 9 and 10 shown on the plan. That is the figure which has been proved by the award to be 18,330*l.*, and in that which has been called a sort of appendix to the award certain other suggested figures are mentioned, not as an alternative award, which might reduce the compensation down to 3000*l.* odd. In my opinion Eve J. was quite right in not treating that as a really relevant matter, but treating this simply as a case in which the arbitrator has, without any mistake of law, found 18,330*l.* to be the proper purchase-money of this portion of the part coloured red, Nos. 9 and 10, Strand.

In my opinion the learned judge was quite right, and this appeal must be dismissed with costs.

PICKFORD L.J. I agree. I do not think it necessary to add anything.

WARRINGTON L.J. I agree. [His Lordship stated the facts.] It seems to me that there can be no question that the 18,330*l.* has been properly ascertained as the purchase-money payable for the land contracted to be sold. We have heard no suggestion that in so dealing with the question the arbitrator has applied

any wrong principle of valuation. What is suggested is that he ought not to have regarded the land contracted to be sold as a part of Nos. 9 and 10, Strand, but ought to have regarded it as part of a larger strip made up of Nos. 9 and 10, Strand and Nos. 1 to 7, Craven Street. I must confess that I am utterly unable to follow that. At the date of the agreement, having regard to the state of things then existing, although Nos. 1 to 7, Craven Street were owned by the South Eastern Railway Company their value was entirely unaffected by anything that was done by widening the Strand inasmuch as the new frontage to the Strand could not have increased the value of those houses so long as the site of them did not form part of one entire site with that which was in the Strand. But even if it did, the only means by which any such increase of value could be relevant would be on the theory of betterment, and the Act of Parliament in this case contains no provision enabling the arbitrator to make any set off on any consideration arising out of betterment. The only pretence for the argument which is put forward on behalf of the County Council is that after the date of the agreement, when the rights of the parties were fixed, and before the date of the award, the railway company did deal with the residue of Nos. 9 and 10, Strand and the houses in Craven Street in one property and together. But then it is said that the arbitrator is not to do what he is told to do by the submission to him, and that which the parties have agreed he shall do, but that he is to take the land the subject-matter of the agreement for sale as if it had been a part, not of Nos. 9 and 10, Strand, but of the larger property made up of Nos. 9 and 10, Strand and Nos. 1 to 7, Craven Street. In my opinion, if the arbitrator had acted upon that contention he would have gone beyond what was submitted to him, and that being so it follows necessarily that the judgment of Eve J., who has accepted the 18,330*l.* as the proper amount of purchase-money to be inserted in the agreement or in the conveyance to be executed in pursuance of the agreement, is correct.

Appeal dismissed.

Solicitors: *Edward Tanner; Herbert H. Groves.*

C. A.
1915
April 20, 21 ;
May 6.

In re MARLAY.
DUKE OF RUTLAND *v.* BURY.

[1914 M. 1360.]

Will—Construction—Devise of Real Estate in Ireland—Irish Land Acts—Contracts with Tenants for Sale of Holdings entered into by Testator before Date of Will—Sanction of Land Commission not obtained before Death of Testator—Conversion—Incidence of Estate Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 4; *s.* 9, *sub-ss.* 1, 5—*Land Law* (*Ireland*) *Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 31, *sub-ss.* 1, 8—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 16.

Testator by his will dated in 1911 (clause 9) devised his W. estates to B. absolutely, and provided (clause 10) that if after the date of his will and prior to his death he should receive (either personally or by payment to any person or persons, or to any bank or company, or into Court on his behalf) any capital moneys in respect of the sale of his W. estates or any part or parts thereof, or if at his death any moneys should be owing to him and subsequently paid in respect of any such sale or sales and which did not pass under the devise and bequest hereinbefore contained, then he bequeathed to B. for his own use and benefit a legacy equal in amount in the aggregate of the net capital moneys so received by or owing to him. The testator bequeathed his residuary personal estate in trust for the person who would at his death have been entitled thereto under the Statute of Distributions if he had died intestate, and who in subsequent proceedings was ascertained to be R.

Prior to the date of his will in some instances and to that of a codicil confirming his will in others the testator had entered into certain contracts with the tenants of the W. estates for the sale to them of their respective holdings under the Irish Land Act, 1903, in the form provided by the Act, which were subject to the sanction of the Land Commissioners being given to them. At his death in 1912 this sanction had not been obtained:—

Held, that there had been no conversion of the W. estates, but that they passed to B. as real estate under clause 9 of the will and not as a legacy of the proceeds of sale of real estate under clause 10.

Held, also, that B. was entitled to the W. estates for an estate in fee simple defeasible on the sanction of the Land Commissioners being given; and that such sanction when given would operate to convert the real estate into personal estate as from its date.

Held, therefore, that on the testator's death the W. estates did not vest in the executors "as such," and that the estate duty was a charge on the land itself and was not payable out of the testator's residuary personal estate.

Held, further, that there was nothing in the Irish Land Acts to alter

that position, except that if and when the purchases were completed the charge would be shifted from the land to the purchase-money, or (in other words) the estate duty would be payable out of that which represented the land and not out of the residuary personal estate.

Lawes v. *Bennett* (1785) 1 Cox, 167 explained.

In re Isaacs [1894] 3 Ch. 506 followed.

Decision of Eve J. reversed.

APPEAL from a decision of Eve J.

Charles Brinsley Marlay by his will dated September 18, 1911, after appointing his nephew Henry John Brinsley Manners, Duke of Rutland, Gustavus Rochford Hyde, Frederick Marlay Bathurst, and John Martin Ross Todd to be the executors and trustees thereof and making various pecuniary and specific bequests, devised and bequeathed as follows:—

Clause 9. "I devise and bequeath all my messuages lands tenements and hereditaments of whatever tenure or nature situate in the county of Westmeath (hereinafter referred to as 'my Westmeath estates') with all rights easements and appurtenances belonging or reputed to belong thereto or held or enjoyed therewith unto the said Charles Kenneth Howard Bury his heirs executors administrators and assigns absolutely according to the nature and tenure thereof respectively for his and their own use and benefit."

Clause 10. "If after the date hereof and prior to my death I shall receive (either personally or by payment to any person or persons or to any bank or company or into Court on my behalf) any capital moneys in respect of the sale of my said Westmeath estates or any part or parts thereof or if at my death any moneys shall be owing to me and subsequently paid in respect of any such sale or sales and which do not pass under the devise and bequest hereinbefore contained then I bequeath to the said Charles Kenneth Howard Bury for his own use and benefit a legacy equal in amount to the aggregate of the net capital moneys so received by or owing to me."

Then after making certain other specific and pecuniary bequests and certain specific devises as therein mentioned the testator (clause 18) devised and bequeathed all the residue of his real and personal estate unto his trustees upon trust to sell and convert and out of the money to arise from such sale and

C. A. 1915 — MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY.

conversion to pay his funeral and testamentary expenses and debts and also to pay or provide for the pecuniary legacies and annuities thereby bequeathed and to hold the residue of the said moneys in trust for the person or persons who would at the death of the testator have been entitled to his personal estate under the Statutes for the Distribution of the Personal Estate of Intestates if the testator had died intestate, such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes.

By a codicil to his will dated May 29, 1912, the testator, after releasing certain debts owing to him by the Royal Botanic Society of London, in all other respects confirmed his will.

The testator died on June 18, 1912, and his will and codicil were duly proved by the executors therein named.

At the date of his will the testator had already entered into contracts with some of the tenants of the Westmeath estates for the sale to them of their respective holdings pursuant to the Irish Land Act, 1903, and after the date of the will but before the date of the codicil he entered into similar contracts with other tenants of the same estates. The aggregate purchase price for these holdings amounted to 52,636*l.* Guaranteed Three per cent. Land Stock. The contracts were all in the same form and provided that "In case an estate comprising the said holding shall be sold under the provisions of the Irish Land Acts, 1903 and 1909, the vendor hereby agrees to sell, and the tenant agrees to purchase, the said holding for the sum of" £——.

In the case of the sale of lands occupied by tenants under the Irish Land Acts, 1903 and 1909, it is the duty of the Land Commission to determine whether the lands sold are fit to be regarded as a separate estate for the purpose of sale under these Acts and a decision in the affirmative is necessary before the sales can be carried out. On October 31, 1911, the testator had joined with the tenants in lodging an originating application in the Estates Commissioners' office for an order declaring that the lands included in the contracts were fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903, but no such order had been made prior to the testator's death or had since been made.

In November, 1912, administration proceedings were commenced by the Duke of Rutland, the plaintiff in the present case, with a view to ascertaining who was entitled to the testator's residuary personal estate, and on March 12, 1913, the Master certified that the plaintiff was the only person who would at the death of the testator have been entitled to his personal estate under the Statutes for the Distribution of the Personal Estate of Intestates if the testator had died intestate.

By an agreement dated May 9, 1913, and made between the plaintiff and the defendant Bury, after reciting that doubts existed whether the moneys which might thereafter become payable in respect of the pending sales of a certain part of the Westmeath estates ought or ought not to be brought into account in estimating the amount of the legacy under clause 10 of the testator's will, it was agreed (subject to the approval of the Court) (inter alia) that for the purpose of estimating the amount of the legacy by clause 10 of the will bequeathed to the defendant Bury there should be brought into account (inter alia) the net moneys to be received in respect of the said purchase agreements and the interest thereon and the bonus payable in respect thereof.

By an order dated July 15, 1913, the Court directed that the testator's executors should settle the defendant Bury's claims as devisee and legatee under the will upon the terms of this agreement. Accordingly by a deed dated September 1, 1913, the executors and the plaintiff assigned to the defendant Bury absolutely the purchase agreements above mentioned and all their interest in the property comprised therein and all the moneys to arise from sales under these agreements subject only to the payment by him out of the purchase-moneys of all the usual costs, charges, and expenses of or incidental to the sales of the said lands and also all the usual outgoings properly payable or chargeable against the said moneys, including the redemption prices of all tithes, tithe rent-charges, quit or Crown rents, superior interests and incumbrances or apportioned parts of the same as the case might be. And the defendant Bury covenanted with the executors and the plaintiff to pay the above mentioned costs, charges, expenses and outgoings and to indemnify the executors

C. A. 1915 — MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY.

and the plaintiff against the payment of the same, and released and discharged the real and personal estate of the testator from the legacy equal in amount to the aggregate of the net capital moneys bequeathed to him as aforesaid and all interest thereon and from all actions, proceedings, accounts, claims and demands in respect of the same or any part thereof or in anywise relating thereto. And the defendant Bury further covenanted that he would keep the executors and the plaintiff indemnified against all actions, proceedings, accounts, claims and demands on the part of any person or persons whomsoever and from all damages and expenses in respect of the legacy or the interest thereon or any part thereof respectively or anything in anywise relating to the premises.

On May 27, 1914, the plaintiff issued the present originating summons for the determination of the question (inter alia) whether the defendant Bury was liable to pay the estate duty in respect of the net moneys to be received under or in respect of the purchase agreements entered into between the testator and the tenants of the Westmeath estates for the sale and purchase of their respective holdings pursuant to the Irish Land Act, 1909, at prices amounting in the aggregate to the sum of 52,636*l.* Guaranteed Three per cent. Stock, or whether such estate duty was payable out of the testator's residuary estate.

Eve J. held that the testator's interest in the property comprised in the purchase agreements had been conditionally converted and that on the approval of the Irish Land Commission Court being given to the agreements the conversion would relate back to their respective dates. That being so, the effect of what had taken place was to constitute such moneys as should be received under the conditional agreements personal estate the duty upon which was payable out of the residue and was not chargeable upon the devisee of the real estate. The agreement of May 9, 1913, and the deed of September 1, 1913, by which that agreement was carried into effect had not altered that position.

The plaintiff appealed.

Campbell, K.C., and *S. Leeke*, for the appellant. The estate duty is a charge on the Westmeath estates. The main question

on this appeal is how far the equitable doctrine of conversion applies under the Irish Land Purchase Acts. There is a difference of opinion on the point between the Courts in Ireland, and the question has never been actually decided by the Court of Appeal there. The testator had large estates in Ireland, the bulk of which were in the hands of agricultural tenants. There are two ways under the Irish Land Act, 1903, of selling agricultural land to the tenants so as to turn them into proprietors. One of them is by selling direct to the Land Commission; the other is by selling to the tenants themselves by agreement subject to the sanction of the Commission. In the latter case (which was the course adopted in this case) the agreements are made subject to the sanction of the Commission and to their power to make a declaration that the property constitutes an "estate" for the purposes of the Act. The Commission may declare part only to be an "estate," in which case it is open to the landlord to withdraw the whole scheme. In the present case the Commission have never accepted the whole or any part of the property as an "estate." When a declaration has been made the title has to be investigated, an order made vesting the property in the tenants, incumbrances discharged, and the balance of the purchase-money paid to the vendor.

In the present case it is submitted that, the sanction of the Land Commission which was necessary to the completion of the sale not having been given, there has been no conversion of the realty into personalty, and that the doctrine of conversion does not apply to great State operations of this sort which depend on the volition of a State department. The cases on the subject of conversion by conditional contracts begin with *Lawes* v. *Bennett* (1), which decided that there was a conversion when the condition was fulfilled as from the date of the original agreement, but applies only as between the real and personal representatives of the original creator of the option, and is not to be extended: *Edwards* v. *West.* (2) The rule does not apply where the testator has manifested an intention to pass the estate which he had in the property to his devisee: *Emuss* v. *Smith* (3); *In re*

(1) 1 Cox, 167. (2) (1878) 7 Ch. D 858, 863.
(3) (1848) 2 De G. & Sm. 722

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY.

Pyle. (1) Here the defendant Bury takes the property whether or not conversion has taken place. The question whether conversion takes place, and from what date, when agreements for sale have been executed but the owner dies before they have been sanctioned has arisen frequently in Ireland. Where agreements for sale had not been so sanctioned it was held in *In re Sherlock's Estate* (2) by Meredith J. that there had been no conversion, and the majority of the Court of Appeal affirmed his decision. In a case where an advance had been sanctioned but the purchase had not been completed it was held that was conversion: *In re Walsh's Estate* (3); see also *In re Bateson's Estate.* (4) The law was not settled by *In re Sherlock's Estate.* (2) In *In re Doyle's Estate* (5) it was held that there had been conversion at the date of the owner's death. That case was followed in *Jones* v. *Bailey* (6) (in which the learned judge appears to have ignored the codicil) and was considered in *In re Steele* (7), where the point was not actually decided, though Palles C.B. thought that under the Land Acts there was no conversion.

Sects. 31 to 36 of the Land Law (Ireland) Act, 1896, were not cited in *In re Sherlock's Estate* (2); *In re Croker's Estate* (8); *In re Finnemor's Estate* (9); *Johnson* v. *Barton.* (10) At all events there was no conversion before the vesting order; it did not relate back to the agreement or the death of the testator or to any other date: *In re Isaacs.* (11)

Clause 10 of the will does not affect this question. At the date of the testator's death none of the 52,000*l.* was owing to himself: *Stephenson* v. *Dowson* (12); *Collins* v. *Doyle* (13); *Martin* v. *Hobson.* (14) Reliance is also placed on the deed of September 1, 1913, as having finally closed all questions between the plaintiff

(1) [1895] 1 Ch. 724.
(2) [1899] 2 I. R. 561.
(3) MacCarthy's Land Purchase Cases, 100, referred to in Cherry's Irish Land Law, 3rd ed. p. 381.
(4) [1895] 2 I. R. 559.
(5) [1907] 1 I. R. 204.
(6) [1910] 1 I. R. 110.
(7) [1913] 1 I. R. 292, 306.
(8) [1913] 1 I. R. 522.
(9) [1913] 1 I. R. 130.
(10) O'Connor M.R., Jan. 12, 1915. Not yet reported.
(11) [1894] 3 Ch. 506, 511.
(12) (1840) 3 Beav. 342.
(13) (1826) 1 Russ. 135.
(14) (1873) L. R. 8 Ch. 401.

and the defendant Bury. [They also referred to ss. 16 and 24 of the Irish Land Act, 1903.]

Clayton, K.C., and *H. S. Preston*, for the defendant Bury. The first question is whether in the circumstances existing at the testator's death this property was money or land. That depends upon the will of the testator himself, not upon the will of other persons. If there was a contract for sale binding on the testator at the date of his death the property was converted and the duty will be payable out of the residuary personal estate and there will be no charge for duty on the land. Where a landowner has entered into a contract for sale which binds him, although subject to a condition which depends upon the exercise of an option of purchase at a future time, the exercise of the option has a retrospective operation and operates as an absolute conversion: *Lawes* v. *Bennett*. (1) If there is a conversion in equity at the death the property passes to the executors as such and estate duty is payable by them out of the residuary personal estate as part of the testamentary expenses.

The English decisions such as *Lawes* v. *Bennett* (1) deal with cases of conversion by an exercise of an option after the death. Conversion in such cases depends on contract. It is the contract to sell which effects the conversion if followed by the exercise of the option. In such case the exercise of the option depends on the unfettered will of the person to whom the option is given and yet it is held conversion is effected. A fortiori is conversion effected under the Irish Land Acts where the matter is not left to the unfettered will of the Land Commissioners. They have to decide the matter judicially. So far as the testator is concerned he was bound and had shown his intention to convert by contracting to sell and putting forward the case as one to be sanctioned by the Commissioners. The tenants as purchasers are in the same position. The doctrine of relation back applies and conversion takes effect when the sanction is given from the date of the contract. It is admitted that apart from the agreement of May 9, 1913, and the deed of September 1, 1913, if the sanction is not given the payment of the duty will fall upon the defendant Bury. The effect of *Lawes* v. *Bennett* (1) is, as stated by

(1) 1 Cox, 167.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v* BURY.

Baggallay L.J. in *In re Adams and Kensington Vestry* (1), that when once the option has been exercised a doctrine similar to that of relation back in bankruptcy operates with all its force: see also 1 White and Tudor's Leading Cases, 8th ed. p. 373. Conversion depends on the will of the owner of the property, and the owner of this property intended that it should be purchased under the Irish Land Acts and did all he could to further that object.

The general principle as to conversion is laid down by Sir Thomas Sewell M.R. in *Fletcher* v. *Ashburner.* (2) In *Townley* v. *Bedwell* (3), although Lord Eldon gave the rents and profits to the tenant for life, he did not say that he did so because there was no conversion until the option was exercised. *Edwards* v. *West* (4) shows that as between the real and personal representative conversion takes place at or before the death of the testator, but that is not so as between vendor and purchaser. In the latter case conversion takes place at the date of the exercise of the option. The principle of *Lawes* v. *Bennett* (5) applies to an intestacy, even though the option of purchase is exercisable only after the death of the grantor: *In re Isaacs.* (6)

All the English cases which have been referred to were cases dealing with options to purchase. The present case is that of a contract binding on both parties but subject to the approval of a third party. It is not really conditional at all. The Commissioners have no discretion if certain conditions of fact which exist in other cases exist: Irish Land Act, 1903, ss. 1, 16, 24.

[WARRINGTON L.J. The equitable doctrine of conversion depends upon the law of trusts. The devisee holds the estate. On the exercise of the option he holds it upon trust to convey it to the purchaser, and on payment becomes a trustee of the purchase-money.]

That is so. In *Lysaght* v. *Edwards* (7), where the whole basis of the doctrine of conversion is discussed at length, Jessel M.R. (8)

(1) (1884) 27 Ch. D. 394, 399.
(2) (1779) 1 Bro. C. C. 497; 1 Wh. & T. L. C., 8th ed. pp. 347, 349.
(3) (1808) 14 Ves. 591.
(4) 7 Ch. D. 858, 863.
(5) 1 Cox, 167.
(6) [1894] 3 Ch. 506.
(7) (1876) 2 Ch. D. 499.
(8) 2 Ch. D. 520.

shows that in his view the conversion in *Lawes* v. *Bennett* (1) took place in the testator's lifetime as from the date of the contract. *Weeding* v. *Weeding* (2) has no application to this case, as the testator there devised the estates as land in one alternative and as money in the other.

The Irish decisions, apart from obiter dicta, are uniform that under these Land Purchase Acts as between the real and personal representatives conversion takes place as from the date of the agreement. See per Holmes L.J. in *In re Sherlock's Estate.* (3) *In re Doyle's Estate* (4) is a decision and not a dictum that the rights as between the real and personal representatives are to be determined as at the death. *Jones* v. *Bailey* (5) is a decision to the same effect. In *In re Mooney's Estate* (6) there is a dictum of the Court of Appeal approving *In re Sherlock's Estate.* (3) In *Latham* v. *Travers* (7) there is a dictum approving *In re Doyle's Estate* (4) and *In re Sherlock's Estate.* (3) In *In re Steele* (8) Palles C.B. expressed his approval of the principle of relation back laid down by Holmes L.J. in *In re Sherlock's Estate.* (3) [They also referred to *In re Croker's Estate* (9); *Johnson* v. *Barton.* (10)]

[LORD COZENS-HARDY M.R. referred to Dart on Vendors and Purchasers, 7th ed. p. 299.]

Further as a matter of construction the effect of the will here was to pass the proceeds of sale when the contracts were sanctioned by the Commissioners under clause 10 and not under clause 9 of the will. Regard must be had to the state of the facts existing at the date of the will. The testator had entered into 120 contracts. The contracts bore three dates. The first batch were dated May 1, 1911, before the date of the will. The second and third batches were respectively dated November 1, 1911, and May 1, 1912, after the date of the will and before the codicil. It is submitted as to all these contracts that the intention of the testator was that the property should pass under

(1) 1 Cox, 167.
(2) (1861) 1 J. & H. 424.
(3) [1899] 2 I. R. 561, 607.
(4) [1907] 1 I. R. 204.
(5) [1910] 1 I. R. 110.
(6) [1911] 1 I. R. 125, 134.
(7) [1912] 1 I. R. 140, 148.
(8) [1913] 1 I. R. 292, 307.
(9) [1913] 1 I. R. 522.
(10) O'Connor M.R., Jan. 12, 1915. Not yet reported.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY.

clause 10 as money. Clauses 9 and 10 of the will were intended by the testator to pass all he had. The effect of the codicil was to republish clause 10 of the will as well as clause 9.

The agreement of May 9, 1913, and the deed of September 1, 1913, constituted a bargain of compromise between the defendant Bury and the plaintiff, and their effect was that the defendant Bury was to take the land as money under clause 10 and not as land under clause 9.

[WARRINGTON L.J. What did it matter to the plaintiff whether the defendant Bury took the property as land or as money?]

If he took it as land he would have to pay the duty: if he took it as money the plaintiff would have to pay it.

Campbell, K.C., in reply.

Cur. adv. vult.

May 6. The following written judgments were delivered:—

LORD COZENS-HARDY M.R. The question in this appeal is as to the incidence of estate duty payable in respect of a large estate in Ireland, the property of the late Mr. Marlay. At the date of his will he had entered into contracts with a number of tenants conditional on the Land Commission declaring that the estate was one fit to be purchased and agreeing to provide the money for the purchase. After the date of his will but before the date of a codicil, which confirmed the will, a number of other contracts in the same form were entered into. All such contracts were conditional and the condition was not complied with in the life-time of the testator, nor has it yet been complied with. The total amount of the purchase-moneys mentioned in the agreements is upwards of 52,000*l.* The testator, by clause 9 in his will, devised his Westmeath estates to the defendant Bury absolutely, and by clause 10 he made a certain provision upon which reliance is placed and it is desirable to read it in full: [His Lordship read clause 10 and continued.]

The first and the main contention on the part of the defendant Bury is that the contracts, although conditional, will, if and when the condition is fulfilled, convert the land into money, and that such conversion will relate back to the date of the contracts, and that therefore the 52,000*l.* will vest in the executors "as such"

and that the estate duty will be payable out of the residuary personal estate. On the other hand, the Duke of Rutland, who is the residuary legatee, contends that the estate duty is a charge upon the land and payable out of the land, or out of the 52,000*l.* Eve J. has decided in favour of the defendant Bury.

It was decided as long ago as 1785 by Sir Lloyd Kenyon M.R. in *Lawes* v. *Bennett* (1) that where a lease contains an option to the lessee to purchase the demised property for an agreed sum, and the option is not exercised until after the death of the lessor, the effect is that, as between the real and personal estate of the lessor, the purchase-money goes as personal estate and not as real estate to the devisee. That decision has sometimes been treated as deciding that the conversion takes place from the date of the lease, but a careful examination satisfies me that that was not what the Master of the Rolls decided. He says: "When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period." The fact that the rents and profits, until the option was exercised, were given to the devisee of real estate seems to me to make that point clear. Lord Eldon, who was counsel in *Lawes* v. *Bennett* (1), expressly held in *Townley* v. *Bedwell* (2) that such was the effect of Lord Kenyon's decision, and Lord Eldon's words are clear: "That until the option declared, which ascertains, whether the estate is ever to be converted, the rents and profits must go according to the freehold title," and he ordered that the heir should be let into possession. In *In re Isaacs* (3) the precise point was raised before Chitty J., who held, following *Lawes* v. *Bennett* (1), that the property was converted not from the date of the contract but from the date of the exercise of the option. I think the true view is that the devisee has an estate in fee defeasible upon the exercise of the option. On no other view can the devisee's right to the rents and profits until the option has been exercised be supported. I am aware that there are observations to be found in several authorities to the effect that *Lawes* v. *Bennett* (1) decides that the conversion

(1) 1 Cox, 167, 171. (2) 14 Ves. 591, 595.
(3) [1894] 3 Ch. 506.

C. A. 1915

MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY.

Lord Cozens-Hardy M.R.

relates back to the date of the lease, but I am not satisfied that there is any authority which has disposed of the rents and profits prior to the exercise of the option in a manner different from that which would have been applied if the option had never been exercised.

That being so, apart from any special provision in the Irish Land Acts, what is the defendant Bury's present position? I think it is clear that the Westmeath estates were not vested on the testator's death in the executor "as such," but that they passed to the defendant for a "beneficial interest in possession": s. 8, sub-s. 4; and that the estate duty is a charge upon the land itself and can be raised by the defendant Bury under s. 9, sub-ss. 1 and 5, or, if he pays it himself, he will be entitled to a charge upon the property. The first charge on the property is created by s. 9, sub-s. 1. It follows that in my opinion the defendant Bury has at the present moment a fee simple interest in the Westmeath estates defeasible in an event which has not yet happened, and may never happen, but subject to a first charge in favour of the Crown of the amount of the estate duty.

Is there anything in the Irish Land Acts to alter this position? In my opinion there is not, except to this extent, that if and when the conditional contracts become absolute, and the 52,000*l.* is paid by the Commissioners, the purchasers will acquire an absolute interest free from all charges, including the charge in favour of the Crown or in favour of the person who has advanced the money to pay the duty, such charge being shifted from the land to the purchase-money; in other words, the estate duty will still be payable out of that which represents the land and not out of the residuary personal estate of the testator.

There has been a remarkable difference of judicial opinion in Ireland as to whether conditional contracts for sale, when sanctioned by the Land Commission, do or do not affect conversion on the footing of *Lawes* v. *Bennett*. (1) I am glad to think that it is not necessary, for the purposes of the present case, to discuss the Irish cases or express any opinion upon the somewhat obscure provisions of the Irish Land Acts. If the true view is that there is no conversion, then it is quite clear that the

(1) 1 Cox, 167.

defendant Bury cannot claim to throw the estate duty upon the residuary personal estate. If, however, the better view is that there is a conversion, on the analogy of *Lawes* v. *Bennett* (1), I think the conversion operates from the date when the condition is fulfilled and not from the date of the tenants' contracts or of the application to the Land Commission. In either view this defendant's claim fails.

Two other points were raised. Under clause 10 the defendant Bury contends that the amount of the estate duty is given to him as a legacy. I am unable to agree to this. The clause has no application to a case in which land passes under clause 9, as I hold that it does.

The other point arises upon the construction which ought to be put upon a deed of release and indemnity. If it were necessary, for the purpose of a decision, to consider the terms of the deed, I think I should hold that the defendant Bury has by covenant undertaken to discharge the estate duty, which is plainly a charge upon the land, but I prefer to base my decision upon the grounds which I have already stated.

It follows that in my opinion the appeal must be allowed and it must be declared that estate duty is payable out of the Westmeath estates devised to the defendant Bury.

PICKFORD L.J. In this case the testator owned large estates in Ireland in the county of Westmeath which are spoken of in these proceedings as his Westmeath estates. By his will he devised his Westmeath estates to the defendant Charles Kenneth Howard Bury absolutely. The provisions relating to them are as follows: [His Lordship read clauses 9 and 10 of the will and continued.] Before his death the testator had agreed to sell these estates to the tenants under the Irish Land Acts conditionally on the sanction of the Land Commission being obtained. The form of the contracts was: "In case an estate comprising the said holdings shall be sold under the provisions of the Irish Land Acts, 1903 and 1909, the vendor hereby agrees to sell and the tenant hereby agrees to buy." Some of these agreements were made before the date of the will and some after, but they were

(1) 1 Cox, 167.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY. Pickford L.J.

all before the date of a codicil which was a republication of the will. An application had been made to the Land Commission, but no decision has yet been given. The agreements therefore still remain conditional—the condition has not been fulfilled and it cannot be said to be absolutely certain that it ever will be. If the contracts are carried out it is said that the purchase-money will be about 52,000*l.* An originating summons has been taken out to decide whether the defendant Bury "is liable to pay the estate duties payable or to become payable in respect of the net moneys to be received under or in respect of the purchase agreements entered into between the testator in his lifetime and certain tenants on the said Westmeath estates for the sale and purchase of their respective holdings pursuant to the Irish Land Act, 1909, at prices amounting in the aggregate to 52,636*l.* Guaranteed Three per cent. Stock, which sales have not yet been completed but are now pending in the Court of the Land Commission."

The defendant Bury contends that the contracts when completed will convert the real estate into personalty as from the date of the agreements before the testator's death and that the duties are therefore payable out of the residuary personal estate. The Duke of Rutland, who is the residuary legatee, contends that the duty is a charge on the land and payable out of it or the purchase-money of it.

I think it must be taken as settled that if and when the condition is fulfilled there will be a conversion of the real property affected by the contracts into personalty. That was decided in *Lawes* v. *Bennett.* (1) That decision has been the subject of criticism, but has been followed and acted on for over 100 years, and I consider we are bound by it.

The defendant Bury contends that the result of the decision is that the conversion relates back to the time of the making of the agreements, that therefore the conversion must be held to have taken place in the testator's lifetime, and that the duties are therefore payable out of the residuary estate. It has been stated that such is the result of the decision, notably by Sir George Jessel M.R. in *Lysaght* v. *Edwards* (2), and in some of

(1) 1 Cox, 167. (2) 2 Ch. D. 499.

the Irish cases which were cited to us, but I do not think that in any of those cases it was necessary for the decision of the case to determine the point. This view does not seem to me to be consistent with the words of the judgment in *Lawes* v. *Bennett* (1): "When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period." The difference there mentioned is between a case where there is a contract enforceable during the testator's lifetime and a case where the contract is dependent on a condition not fulfilled till after the testator's death and therefore not enforceable in his lifetime. If the conversion related back as contended there would be no difference and the conversion would take place at the same time.

In *Townley* v. *Bedwell* (2) Lord Eldon, who argued *Lawes* v. *Bennett* (3), acted on that view and ordered the heir to be let into possession of the rents and profits and that the rents of the premises demised to Pratt and the rents of the other premises demised to Townley until the option declared by him belonged to the heir. Townley had declared his option after the testator's death. With respect to the other lands demised to Pratt no option had been declared and it was exercisable during a lease of ninety-nine years.

The exact point was argued before Chitty J. in *In re Isaacs* (4), and he decided that the property was converted from the date of the exercise of the option and not from the date of the agreement.

I think, therefore, that following these authorities we must hold that the conversion has not yet taken place, and that the Westmeath estates at the testator's death were vested in the defendant Bury for an estate in fee defeasible on the fulfilment of the condition and were not vested in the executors as such. If this be so, there is a charge on the property under s. 9, sub-s. 1, of the Finance Act, 1894, and the defendant Bury has power under sub-s. 5 to raise the money for the duty by a sale or mortgage of the property.

(1) 1 Cox, 171.
(2) 14 Ves. 591.
(3) 1 Cox, 167.
(4) [1894] 3 Ch. 506.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY. Pickford L.J.

The event on which the defeasance takes place has not happened and it cannot be said to be certain that it ever will happen. The charge remains a charge upon the land, or in case of the fulfilment of the condition upon the purchase-money representing the land, and the duties are not payable out of the residuary personal estate.

The defendant Bury, however, contended that even if this were the case in general it was not so in the case of this estate because the purchase-money passed under clause 10 of the will as a legacy. I do not think this is correct. That clause deals only with purchase-moneys owing at the time of the death which do not pass under clause 9. It cannot apply to a case where the land passes under clause 9.

Another point was raised upon a deed of September 1, 1913, which carried out an agreement of May 9, 1913, and was said to have the effect of an agreement to treat this purchase-money for all purposes as passing under clause 10.

It is not necessary to say more than that in my opinion it does not release the defendant Bury from the obligation to pay the duties chargeable upon the land and the proceeds of it if he were otherwise liable to such payment. I do not see that the Irish Land Acts make any difference to the matter, and I do not think it necessary to express any opinion on the difference that seems to exist between the Irish judges as to the effect of their provisions.

WARRINGTON L.J. The question in this case is as to the incidence of certain estate duty and as to that alone. The question is whether the estate duty attributable to the testator's Westmeath estates will be payable out of the proceeds of a contemplated sale of those estates under the Irish Land Acts if it should be carried into effect or out of the general personal estate. The learned judge in the Court below has taken the latter view, and the residuary legatee appeals.

The testator Charles Brinsley Marlay made his will dated September 18, 1911, and by it he devised his Westmeath estates to the respondent Charles Kenneth Howard Bury absolutely. By a codicil dated May 29, 1912, he confirmed his will. He died

on June 18, 1912. Prior to the date of the codicil he had entered into agreements with his tenants for the sale to them of their holdings, each agreement being, so far as material, in these terms: "In case an estate comprising the said holding shall be sold under the provisions of the Irish Land Acts, 1903 and 1909, the vendor hereby agrees to sell and the tenant agrees to purchase the said holding for" so much. He had also taken the preliminary step of making an originating application for an order that the lands included in these agreements were fit to be regarded as a separate estate for the purposes of the Act of 1903. Unless such an order is made the condition on which the agreements were to take effect will not be fulfilled. No such order was made in the testator's lifetime nor has it yet been made. The case is therefore one in which it depends on the volition of a third party whether the testator's agreement shall become a binding agreement for sale and is analogous to those in which the testator or the intestate, as the case may be, has given a lessee or other person an option to purchase, which option has not been exercised at the death. There is no question that in ordinary cases such a state of things operates to effect a conversion of the estate: *Lawes* v. *Bennett.* (1) It is contended that it does more, and that it effects a conversion as from the date of the conditional contract, so that in the present case the proceeds of the sale if and when carried out must be treated for all purposes, including the incidence of duty, as if they had formed part of the general personal estate. In my opinion this is not the true result of the authorities; I think in such cases the land passes on the death to the heir or devisee as realty for an estate defeasible on the happening of the event which renders the contract binding, and that on the happening of that event and not till then the land is converted into personalty. It is well settled that in such cases the rents and profits are payable to the heir or devisee, his heirs or assigns, until the happening of the event in question, and this I think can only be justified on the footing that the land vests in him as land, and remains so vested until it shifts by the happening of the event.

I will not go through the authorities in detail; it is sufficient

(1) 1 Cox, 167.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY Warrington L.J.

to say that the view I have expressed is supported by the cases of *Lawes* v. *Bennett* (1), *Townley* v. *Bedwell* (2), *Weeding* v. *Weeding* (3), and *In re Isaacs* (4), and I fail to see how the contrary view is consistent therewith. It is in fact expressly rejected by Chitty J. in *In re Isaacs.* (5)

We find therefore that notwithstanding the existence of the conditional contracts the Westmeath estates were lands at the death of the testator and passed to the devisee as such. If this is so, it was property which did not pass to the executors as such and a rateable part of the estate duty on the testator's whole estate became a first charge thereon: see Finance Act, 1894, s. 9, sub-s. 1. If the executor under s. 6, sub-s. 2, had paid the duty, or if the devisee having a defeasible or limited interest only had done so, then the executor under s. 9, sub-s. 5, would have had power to raise the amount by charge of the land and the devisee under s. 9, sub-s. 6, would have been entitled to a charge. In the present case the duty has not yet been paid, and the subsisting charge is that of the Crown under s. 9, sub-s. 1. But whether at the time the land is converted the charge be that of the Crown or that of the executor or devisee the result is the same. It will be an incumbrance on the estate which under the provisions of the Irish Land Acts will be transferred to the purchase-money and be payable thereout.

I think therefore that the declaration of the learned judge should be varied and that as regards the estate duty now in question it should be declared that it is payable out of the proceeds of sale. There is, of course, no doubt that if the sale does not go through the duty would be a charge on the land, and, I suppose for this reason, the question in the originating summons is confined to the duty payable in respect of the proceeds of sale. I have assumed for the purposes of this judgment that conditional agreements under the Irish Land Acts operate to effect a conversion so soon as they become absolute; it has, however, been argued that they do not effect a conversion at all. The authorities on this subject in the Irish

(1) 1 Cox, 167.
(2) 14 Ves. 591.
(3) 1 J. & H. 424.
(4) [1894] 3 Ch. 506.
(5) [1894] 3 Ch. 511.

C. A. 1915 MARLAY, *In re.* RUTLAND (DUKE) *v.* BURY. Warrington L.J.

Courts are somewhat conflicting. It is unnecessary to say which view I consider to be correct, and I therefore express no opinion on the subject.

As to the point raised on clause 10 of the will I am of opinion there is nothing in this; that clause had no operation except as regards the proceeds of the land actually sold in the testator's lifetime.

It is unnecessary to determine the true construction and effect of the agreement of May 9, 1913, and the subsequent deed of September 1, 1913.

Solicitors: *Trotter & Patteson; Benham, Barrett & Synnott.*

W. I. C.

C. A. 1915 *June* 18.

In re TONGUE.

In re BURTON.

HIGGINSON *v.* BURTON.

[1914 T. 963.]

APPEAL from a decision of Warrington J., reported [1915] 1 Ch. 390, where it was held that the doctrine of election applies in the case of a spinster to whom an interest with a restraint on anticipation during coverture is given by the same instrument as that which gives rise to the question of election.

There was no appeal upon the above point of law decided by Warrington J., the appeal being confined to the question of fact whether a certain sum of South Australian stock belonged to Mrs. Tongue, the testatrix, and was property of which she was competent to dispose, or whether it belonged to her daughters.

Clauson, K.C., and *Crossfield*, for the defendants, the appellants.

J. S. Green, *A. Underhill*, and *H. T. Method*, for the respondents, were not called upon.

The COURT (Swinfen Eady, Phillimore, and Bankes L.JJ.) held, affirming the decision of Warrington J., that the South

C. A. 1915 — TONGUE, *In re.* BURTON, *In re.* HIGGINSON *v.* BURTON.

Australian stock was not part of the property of the testatrix of which she was competent to dispose.

Appeal dismissed.

Solicitors: *Long & Gardiner, for Marlow, Marten & Jesson, Walsall; Whitford & Thorp.*

W. J. B.

EVE J. 1915 — *July* 2.

In re MARIETTE.

MARIETTE *v.* GOVERNING BODY OF ALDENHAM SCHOOL.

[1915 M. 924.]

Will—Charitable Gifts—Validity—Gift to Governing Body of School for building Fives Courts—Gift to Headmaster for Prize in School Athletic Sports—Statute of Elizabeth, 43 *Eliz. c.* 4.

By his will a testator bequeathed "1000*l.* to the Governing Body of Aldenham School for the purpose of building Eton fives courts or squash racket courts, or for some similar purpose that shall be decided by a majority of the house masters at the time of my death"; and "100*l.* to the headmaster for the time being of Aldenham School, upon trust to use the interest to provide a prize for some event in the school athletic sports every year agreed upon by the committee of the athletic sports."

Aldenham School was originally founded as a free grammar school and was admittedly a charity within the Statute of Elizabeth. There were 208 boys in the school between the ages of ten and nineteen and almost all boarders:—

Held, that both legacies were valid charitable bequests, it being essential in a school of learning of this description that there should be organized games as part of the daily routine.

ADJOURNED SUMMONS.

By his will, dated December 2, 1908, Edgar Henry Mariette, of Aldenham School, Elstree, in the county of Hertford, after appointing the plaintiffs his executors and trustees, bequeathed the several pecuniary and specific legacies specified in a schedule (annexed to and forming part of his will and signed by himself and the witnesses thereto). The testator then devised and bequeathed all his real estate and the residue of his personal estate not otherwise disposed of, subject to the payment of debts

and duties, unto and to the use of his trustees, upon trust for sale, and to hold the money arising therefrom, as to three fourth parts thereof, in trust for his three brothers (of whom one was a trustee of the will) absolutely in equal shares, and as to the remaining one fourth part thereof upon trusts for the benefit of the widow of a deceased brother and his children, as therein mentioned.

In the schedule to the will the testator bequeathed inter alia, the following three legacies free of duty:—"1000*l.* to the Governing Body of Aldenham School for the purpose of building Eton fives courts or squash racket courts, or for some similar purpose that shall be decided on by a majority of the house masters at the time of my death. 100*l.* to the headmaster for the time being of Aldenham School, upon trust to use the interest for a prize in books to be given every year for classics in the sixth form. 100*l.* to the headmaster for the time being of Aldenham School, upon trust to use the interest to provide a prize for some event in the school athletic sports every year agreed upon by the committee of the athletic sports."

The testator, who had been a master at Aldenham School for twenty-four years, died on June 13, 1914, and his will was duly proved by the plaintiffs. The widow of the deceased brother of the testator was still living and had two children. Aldenham School formed part of a charity founded by Richard Platt, a brewer of London, under letters patent dated February 18, 1596, and was originally founded as a free grammar school. The management of the estates of the charity, under a scheme by the Charity Commissioners dated May 13, 1875, was vested in the Worshipful Company of Brewers, but the management of the school was, under the said scheme, vested in a governing body consisting of fifteen persons of whom eight were nominated by the Brewers' Company.

By the first clause of the scheme the object of the charity was "(*a*) to supply sound practical and liberal education in accordance with the doctrines of the Church of England for boys and girls by means of schools in the parish of Aldenham . . . ." (*b*) To provide for the relief of poor people.

Under clause 97 of the scheme the governing body might

EVE J.
1915
MARIETTE, *In re.* MARIETTE *v.* GOVERNING BODY OF ALDENHAM SCHOOL.

receive additional donations or endowments for any special objects directed by the donors, provided that such objects were certified by the Charity Commissioners to be for the general benefit of the school.

The Rev. Alfred Hands Cooke was the present headmaster of Aldenham School, which was a flourishing secondary public school inspected and approved by the Board of Education. There were 208 boys in the school, four being day boys and the remainder boarders. The ages varied from ten to nineteen. The carrying on of the school was in part dependent upon the yearly allowance of 2500*l.* given by the Brewers' Company under the scheme. The school was carried on on lands at Elstree comprising about forty acres. At present there were only two Eton fives courts, which were not in good repair, and it was proposed to expend the 1000*l.* in erecting four covered or six open courts on a site adjacent to the existing fives courts. In his affidavit the headmaster stated that in his opinion the erection of these extra fives courts was calculated to maintain the utility of the school and to promote its general educational efficiency. He further stated that the existence of prizes for classics and for events in the school athletic sports were desirable, as they were calculated to encourage a healthy spirit of rivalry among the boys, and thereby to promote the wellbeing of the school.

On June 14, 1915, a certificate was granted by the Board of Education, in pursuance of clause 97 of the scheme of May 13, 1875, that the special object directed by the donor of 1000*l.* for the purpose of building Eton fives courts was for the general benefit of the grammar school. It appeared from the affidavit of William Charles Higgins, clerk to the Brewers' Company, that the Board of Education did not consider that the other two legacies came within the provisions of the scheme for the management of the school.

On April 12, 1915, the trustees of the will took out an originating summons to decide the question of the validity of the three legacies, and to whom payment ought to be made. The governing body of Aldenham School, the headmaster, and Richard Lionel Mariette, one of the testator's brothers and interested in the residuary personal estate, were made respondents.

F. E. Farrer, for the trustees of the will.

Maugham, K.C., and *J. F. W. Galbraith*, for the governing body of the school and the headmaster. This school is clearly a charity: *Attorney-General* v. *Earl of Lonsdale*.(1) All these gifts are good charitable bequests as tending to the beneficial carrying on of a charitable institution. It is not necessary to contend that the gift to provide fives courts, and for a prize for athletic sports, are per se charitable gifts, but when given to be used in connection with an educational establishment which is a charity they are good. Every school must provide for the bodily recreation for boys of this age. The case of *In re Good* (2) is precisely in point. *In re Charlesworth* (3) proceeded upon the same lines. The test is whether these gifts go to enhance the efficient carrying on of the school: *In re Donald*. (4) The case of *In re Nottage* (5) is distinguishable.

Clayton, K.C., and *W. A. Peck*, for the residuary legatees. These gifts must be construed according to established principles however much one's natural inclination would be to give effect to them. It is conceded that the school is a charity and comes within the definition of a "school of learning" in the Statute of Elizabeth. If the gift had been for the general purposes of the school it would have been a good charitable bequest. There may be gifts to a charity, however, which are not, per se, charitable when the destination of the gift is looked at. In the present case the gift of 1000*l.* for fives courts is not charitable in the proper sense: *Incorporated Society* v. *Richards*. (6) Many things are ancillary to the purposes of a charity which could not be made the subject of a charitable gift. The case comes within *In re Nottage*. (5) The result of that decision is that gifts for mere sport, although of great utility and extremely desirable, are not charitable within the Statute of Elizabeth. There is no reported case of a gift precisely of this character to a school. [They also referred to *In re Donald* (4), *In re Clarke* (7), and *In re Drummond*. (8)]

(1) (1827) 1 Sim. 105.
(2) [1905] 2 Ch. 60.
(3) [1910] W. N. 18.
(4) [1909] 2 Ch. 410.
(5) [1895] 2 Ch. 649.
(6) (1841) 1 D. & War. 258, 294.
(7) [1901] 2 Ch. 110.
(8) [1914] 2 Ch. 90.

EVE J.
1915
MARIETTE, *In re.* MARIETTE *v.* GOVERNING BODY OF ALDENHAM SCHOOL.

EVE J. The admonition with which Mr. Clayton commenced his argument is by no means to be disregarded. One must be careful not to allow one's natural inclination to give effect to a gift of this sort to lead one to disregard well-established principles. The gift in question is a gift by a gentleman who had served this school for twenty-four years as an assistant master and who had obviously come to entertain for it in a marked degree that affection which most men feel for the old school, and which would certainly tend to increase in the case of a man who had given the best part of his life to its services. The amount is to be laid out in the erection of additional fives courts at the school, and the question is whether it is a gift which in law can be supported or whether it is void as not being charitable and tending to a perpetuity. It is a gift to an institution which admittedly is a charity within the Statute of Elizabeth, but I accede to the argument of the residuary legatees that it is quite possible that a gift to a charity may be of such a character as not to be in itself a charitable gift. On the other hand I think in considering whether a gift is charitable or not one must not confine oneself to the character of the gift itself, but must pay regard also to the character and objects of the charity who are the intended recipients of the gift.

The object of this charity is the education, in the widest sense, of boys and young men between the ages of ten and nineteen. No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind. It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily occupation, mental occupation by means of the classics and those other less inviting studies to which a portion of the day is devoted, and bodily occupation by means of regular and organized games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them, but would probably result in their quickly relapsing into something approaching barbarism. For these reasons I think it is essential that in a school of learning of this description, a school receiving and retaining as

boarders boys of these ages, there should be organized games as part of the daily routine, and I do not see how the other part of the education can be successfully carried on without them. It is not disputed that if this sum—I am dealing now with the 1000*l.*—had been left to the charity, for the general purposes of the charity, it might have been applied to any of the purposes to which moneys coming to the hands of the governing body are in fact applied; it might have been expended in the repair or in additions to the class-rooms, laboratory, and other buildings of that sort; or it might equally, as it seems to me, have been applied to the repair or enlargement of the swimming bath, the gymnasium, the fives courts, or other buildings employed in those branches of education which have exclusively to do with the bodily welfare of the students. I cannot, in these circumstances, bring myself to think, because the testator has indicated his intention that in the hands of the charity this money shall be used for the particular purposes stated in his will, that the gift is thereby vitiated. On the contrary I think the gift is a good charitable gift. It is a gift to a charity for purposes which seem to me to be included in the objects of the charity.

The same reasoning applies to the 100*l.* It is given not to the charity but to the headmaster, but it is given for a purpose which, though not quite so specific as the purpose for which the 1000*l.* is given, is in my opinion within the objects of the charity, that is to say, the advancement of that part of the educational work of the charity which has to do with the bodily and physical development of the students. I think both legacies are valid charitable legacies, and I so hold.

I have said nothing about the 100*l.* for the classical prize; that is clearly good, and the contrary has not really been argued.

Solicitors: *Evans, Wadham & Co.; Druces & Attlee.*

G. M.

EVE J.
1915
July 7.

In re CROXON.
FERRERS *v.* CROXTON.

[1915 C. 1539.]

Will—Settlement—Annuities—Charge upon Realty and Personalty—Insufficiency of Income—Deficiency paid out of Corpus—Recoupment—Tenant for Life and Remainderman.

A testator bequeathed three annuities charged upon the income and corpus of his residuary estate. The whole of his estate was settled in strict settlement upon his son and grandson. The income was insufficient to keep down the annuities, and 19*l.* 4*s.* 7*d.* was raised out of capital to satisfy the annuity of the first annuitant, who died in 1911. Sums amounting to 32*l.* 3*s.* 10*d.* had also been paid out of capital to the two surviving annuitants. It was now anticipated that there would be surplus income in the hands of the tenant for life after satisfying the annuities. On a summons by the trustees of the will to ascertain whether this income should be applied in recouping to capital the sums raised thereout, or either of them :—

Held, that, having regard to the decision in *Prince* v. *Cooper* (1853) 17 Beav. 187, and to the fact that the annuities were charged upon capital as well as income, the tenant for life could not be called upon to replace the deficiency raised out of capital.

By his will, dated June 29, 1898, the testator, Boydell Jones Croxon (otherwise Croxton), after making certain pecuniary and specific bequests, gave and devised all the rest and residue of his real and personal estate unto and to the use of the plaintiff, Henry Ferrers Ferrers, and the first defendant, Compton Herbert Croxton (whom he also appointed executors), to be held by them upon trust to raise thereout, during such time as his son the defendant C. H. Croxton might hold the testator's residuary estate thereinafter devised, an annuity of 50*l.*, and to pay the same to his daughter Cicely Margaret Batstone for her life, and on his son ceasing to hold the said estate to increase the annuity to 150*l.*, and upon trust to raise further like annuities of 50*l.* and 150*l.* respectively, and to pay the same to his daughter Constance Henrietta Anne Crane in like manner; and upon trust to raise and pay an annuity of 50*l.* to his niece Clara Price

during spinsterhood; and upon further trust to permit certain furniture and effects to be enjoyed as heirlooms by the person for the time being entitled to the real estate thereinafter devised; and subject thereto, as to his real estate called The Haughtons and all the rest of his real property, upon trust for his son C. H. Croxton for life, without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with remainder to the testator's grandson, the second defendant, Francis Charles Cecil Ferrers, during his life, without impeachment of waste, with remainder to his first and other sons in tail male, with remainders over; and as to all the residue of his personal estate, upon trust to get in and invest the same, and to hold the investments upon the same trusts (as nearly as the rules of law and equity might permit) as were thereinbefore declared concerning the residue of his real estate; and there was a forfeiture clause in certain events which did not become operative. By a codicil to his will, dated June 7, 1901, the testator reduced the annuity to Clara Price to 12*l.* per annum instead of 50*l.* The testator died on October 15, 1902, and his will and codicil were duly proved.

By an order of Kekewich J. dated March 7, 1904, it was declared that the pecuniary legacies given by the testator's will and codicil were payable out of the whole of his real and residuary personal estate, including the settled chattels, and that the annuities given by the will were, subject to the payment of the pecuniary legacies, payable out of the whole of the testator's real and residuary personal estate except the settled chattels, and leave was given to sell these chattels. The testator's real estate described as The Haughtons was sold shortly after his death, and the net proceeds, after paying off a mortgage, amounted to 625*l.* A freehold house at Barnstaple was sold for 510*l.* The personal estate consisted of two sums of railway stock (700*l.*). The settled chattels realized 60*l.* 15*s.*, and other personalty amounted to 740*l.*

The testator's daughter Cicely Margaret Batstone died on July 14, 1911. The other two annuitants were still living. The annuitant Clara Price had never married, and the defendant C. H. Croxton was still tenant for life of the testator's trust estate.

EVE J.
1915
CROXON, *In re.* FERRERS *v.* CROXTON.

The income produced by the testator's estate was never sufficient to pay the annuities bequeathed by his will and codicil in full, and to make up the annuities it was necessary to draw upon the capital of the trust estate. At the death of Mrs. Batstone the amount of capital thus expended was 43*l.* 1*s.* 4*d.*, of which 19*l.* 4*s.* 7*d.* represented the amount required to make up Mrs. Batstone's annuity. Since her death further capital had been expended in making up the subsisting annuities, the total capital expended up to October 15, 1914, being 51*l.* 8*s.* 5*d.* It was probable that the income of the estate would now be more than sufficient to meet the yearly payments of the annuities. The defendant C. H. Croxton had no children, and the defendant F. C. C. Ferrers was the second tenant for life under the settlement and represented the remaindermen.

Henry Ferrers Ferrers and the Public Trustee (appointed in 1912) were the present trustees of the testator's will, and also the trustees of the settlement created by the will and codicil. On May 18, 1914, they took out an originating summons asking that it might be determined (*a*) whether the amount which had been expended out of capital to make up the annuity to Mrs. Batstone ought to be recouped to such capital out of the income of the trust estate accruing since her death; (*b*) whether the amounts which had been from time to time expended out of capital to make up the subsisting annuities ought to be recouped to such capital out of the income of the trust estate before any payment was made to the defendant C. H. Croxton on account of such income; (*c*) how otherwise the income of the said trust estate ought to be applied.

Austen-Cartmell, for the trustees of the will.

J. E. Harman, for the first defendant, the tenant for life.

A. B. Marten (for *Gavin T. Simonds*, serving with His Majesty's Forces), for the second defendant (representing the remaindermen). There should be a recoupment to capital out of the surplus income in respect of the past and any future deficiency during the whole of the life interest of the tenant for life. [He referred to *Honywood* v. *Honywood* (1); *In re*

(1) [1902] 1 Ch. 347.

Popham (1); *Prince* v. *Cooper* (2); *In re Grant* (3); and *Coote* v. *O'Reilly.* (4)]

EVE J. The testator bequeathed three life annuities charged upon the income and corpus of his residuary estate. Unfortunately, the income has throughout been insufficient to keep down the annuities, but in consequence of the death of one annuitant in 1911, and the recent sale of an unproductive asset and the investment of the proceeds, it is anticipated that there will now be forthcoming sufficient income to keep down the remaining annuities and to leave a small annual surplus. To satisfy the annuity of the annuitant who died in 1911, the sum of 19*l.* 4*s.* 7*d.* in all was raised out of capital, and there have also been paid to the annuitants who still survive capital moneys amounting to 32*l.* 3*s.* 10*d.* The question is whether the surplus income which will, it is anticipated, be coming to the hands of the tenant for life ought to be applied in recouping to capital these sums of 19*l.* 4*s.* 7*d.* and 32*l.* 3*s.* 10*d.*, or either of them. I think the 19*l.* 4*s.* 7*d.* is entirely covered by the decision in *Prince* v. *Cooper.* (2) If I were to direct recoupment out of future income I should be ignoring the fact that the annuity is charged upon capital as well as income. No doubt such a charge is primarily for the benefit of the annuitant, but in adjusting the rights of tenant for life and remainderman I do not think the Court can properly disregard the fact that the annuity is so charged, and I adopt the reasoning of the Master of the Rolls in the case I have mentioned and hold that there is no right to have the 19*l.* 4*s.* 7*d.* recouped to capital out of future income. I think the same considerations apply to the 32*l.* 3*s.* 10*d.* raised in respect of the continuing annuities. Strictly speaking the annuitant is entitled, on the recurring days on which his annuity becomes payable, to call upon the trustees to apply the income in hand in or towards satisfying the instalments of his annuity, and if the income be deficient he may require them to make good the deficiency out of capital. If this course were strictly

(1) [1914] W. N. 257; 111 L. T. 524.
(2) 17 Beav. 187.
(3) (1883) 52 L. J. (Ch.) 552.
(4) (1844) 1 J. & Lat. 455.

EVE J.
1915
CROXON, *In re.* FERRERS *v.* CROXTON.

pursued the life tenant could not, as it seems to me, be called upon subsequently to replace the deficiency raised and paid out of capital. The instalment of the annuity would have been properly paid out of the two sources made available by the testator for its payment, and I see no valid reason why the life tenant should be ordered to forgo future income to replace capital properly applied in the discharge of a liability imposed upon it. In the present case the annuities are payable quarterly. It would obviously be inconvenient to adjust the charge as between capital and income four times in each year, and I think for this purpose the proper course is to treat the annuities as payable annually, on the anniversary of the death of the testator, and on each anniversary to apply the income then available in keeping down the annuities, and if there is a deficiency to make up such deficiency out of corpus, starting de novo for the next year, and without any right to resort to future income for recouping capital. That was the effect of the decision in *In re Grant* (1), which I respectfully accept as good sense and good law.

Solicitors: *Patersons, Snow & Co., for Longueville & Cc., Oswestry.*

(1) 52 L. J. (Ch.) 552.

G. M.

EVE J.
1915
July 7.

In re STOODLEY.
HOOSON *v.* LOCOCK.

[1915 S. 1590.]

Will—Codicil—Construction—Residuary Bequest in Will—Bequest in Codicil of "the residue of my estate not bequeathed by the above will."

A clear unambiguous gift in a will can be revoked by codicil only by words at least equally clear and unambiguous as those of the original gift.

The rule stated in *Hearle* v. *Hicks* (1832) 1 Cl. & F. 20, 24, followed.

Earl of Hardwicke v. *Douglas* (1840) 7 Cl. & F. 795 discussed.

A testator, after making numerous specific and pecuniary bequests and devising certain lands for charitable purposes, devised and bequeathed all his real and personal estate, not thereby otherwise disposed of, to his trustees upon trust to sell, and, after certain payments therein directed, to hold the residue and the income in trust, as to one third, for the Society for Promoting Christian Knowledge, and as to the other two thirds for the vicar of I. for purposes connected with his church. On February 17, 1915, the testator made a codicil, in which, after referring to his will, he continued: "The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock . . . . absolutely, and I appoint her sole executrix of this codicil." The testator died on February 27, 1915:—

Held, that what passed under the bequest in the codicil was such portion (if any) of the residue as might ultimately turn out not to have been effectually disposed of by the will.

Adjourned Summons.

By his will, dated December 21, 1912, the testator, Thomasin Albert Stoodley, clerk in holy orders, appointed the plaintiffs, the Reverend Percy Lane Hooson and John Heslington Pitchforth, to be his executors and trustees, and, after making various specific and pecuniary bequests, gave and devised certain lands, or the money to arise from the sale thereof, for a charitable purpose. The testator then made another gift for the spiritual benefit of the parish of Ilminster in Somersetshire, and continued: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that they shall sell, call in, and collect the same, and shall, out of the monies to arise thereby, and all other monies forming part of my estate, pay my funeral and testamentary expenses and debts, and the legacies other than specific bequeathed by

EVE J. 1915 STOODLEY, *In re.* HOOSON *v.* LOCOCK.

this my will, or any codicil thereto, and shall hold the residue of the said monies and the income thereof in trust, as to one equal third part thereof, for the Society for Promoting Christian Knowledge, and as to the two remaining equal third parts, for the vicar for the time being of Ilminster aforesaid, to be applied by him as to part thereof towards providing an adequate vestry for the parish church, and as to the remainder towards extending the nave of the said church one bay westwards."

A codicil to his will, dated February 17, 1915, but signed on February 19, 1915, was as follows: "This is a codicil to the will of me, Thomasin Albert Stoodley, of 73, Wimborne Road, Bournemouth, the said will having been made in December, 1912, and being in the possession of J. H. Pitchforth, solicitor, of 9, Bush Lane, Cannon Street, E.C. The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil."

The testator died on February 27, 1915, and probate of the will and codicil was granted to the plaintiffs and to M. A. Locock on May 4, 1915. The residuary estate amounted to 3819*l.* 18*s.* 5*d.* One of the specific gifts contained in the will had lapsed. The testator was a widower at the time of his death, and died without issue and without leaving parent, brother or sister, nephew or niece, him surviving.

The trustees of the Society for Promoting Christian Knowledge and the Reverend Prebendary James Street, vicar of Ilminster, were defendants to the action.

The summons was taken out by the executors and trustees of the will for the decision of the question whether the gift to the defendant Mabel Abbie Locock by the codicil revoked, in whole or in part, the residuary gift contained in the will to the Society for Promoting Christian Knowledge and the vicar for the time being of Ilminster, or, alternatively, what portion of the testator's estate passed to the defendant M. A. Locock under the gift in the codicil.

F. Whinney, for the executors and trustees of the will.

Maugham, K.C., and *H. B. Vaisey*, for Miss Locock. This

gift of "the residue of my estate" in the codicil amounts to a revocation of the gift of residue in the will. By the will everything is disposed of, and any lapsed legacy would fall into the residue, so there is nothing which is "not bequeathed by the above will," and those words are meaningless. The gift by codicil was made on the death-bed of the testator, and was to Miss Locock absolutely, and she is made sole executrix; this points to an intention by the testator to revoke the residuary devise in the will. The point is really concluded by the decision in *Earl of Hardwicke* v. *Douglas* (1), where Lord Brougham asks in the course of the argument, "Can there be such a thing as a residue excepted out of a residue?" If there was an absurdity it was of the testator's creating. It was suggested in that case that "residue" might refer to property acquired after the making of the codicil and which would, in the testator's opinion, remain undisposed of. In the present case the existence of the will is clearly in the testator's mind, as he expressly refers to it in the codicil. There is, we submit, sufficient to show an intention to revoke the gift of residue in the will.

[EVE J. referred to *In re Barrance.* (2)]

Clayton, K.C., and *A. J. Spencer* (for *F. H. L. Errington*, serving with His Majesty's Forces), for the Society for Promoting Christian Knowledge. The case of *Earl of Hardwicke* v. *Douglas* (1) is plainly distinguishable, as the decision turned upon the particular circumstances of that case; it was also admitted in that case that the testator had his will and the residuary clause before him when he was making the codicil. The judges also disagreed upon the construction of the codicil. If it is to be assumed that the testator had some testamentary intention when executing the codicil, then some effect must be given to it, and the Court will endeavour to reconcile both will and codicil. The residue having been given in the will to two different charities, one or both of these gifts might possibly have failed, and there would have been an intestacy, and the codicil might thus operate upon such gifts as were not effectually bequeathed. That construction gives the codicil a possible testamentary operation. There might also be a disclaimer

(1) 7 Cl. & F. 795, 808. (2) [1910] 2 Ch. 419.

EVE J. 1915 STOODLEY, *In re.* HOOSON v. LOCOCK.

of one or other of the charitable gifts, leaving something undisposed of to go to the next of kin. In the case of *In re Isaac* (1) there were two residuary gifts in a will and it was held that lapsed legacies fell into the first residue. So also in *Davis* v. *Bennet* (2), where it was held that the first gift of residue was not revoked by the second. If there are two apparently quite irreconcilable gifts in a will, it may be that the last overrides the first, according to the old rule referred to in Jarman on Wills, 6th ed. pp. 565, 570; but the Court will always endeavour to reconcile two merely inconsistent clauses: *Brocklebank* v. *Johnson* (3); *Shipperdson* v. *Tower* (4); *Kermode* v. *Macdonald.* (5) The case would be clear apart from the authority of *Earl of Hardwicke* v. *Douglas.* (6)

F. E. Farrer, for the vicar of Ilminster. Where there is a clear bequest or devise by a will, the revocation by a codicil must be equally clear: *Hearle* v. *Hicks.* (7) Here there is no clear revocation. It would have been quite easy for the testator to have expressed his intention to revoke the residuary bequest in the will by the codicil. The case of *Earl of Hardwicke* v. *Douglas* (6) is distinguishable from the present case on its facts. It was repeatedly said by Lord Brougham in his judgment that the testator had the will before him when the second codicil was made. Here that was not so. The case of *Lee* v. *Delane* (8) is somewhat similar to the present, and in that case *Earl of Hardwicke* v. *Douglas* (6) was distinguished.

Maugham, K.C., in reply.

EVE J. In approaching the construction of these two documents—the will and the codicil—one must assume that the testator had some testamentary intention when he executed the latter, and in ascertaining and giving effect to that intention I must do my best to reconcile the provisions of the will and codicil. What then was the testamentary intention with which the testator executed this codicil?

(1) [1905] 1 Ch. 427.
(2) (1861) 30 Beav. 226.
(3) (1855) 20 Beav. 205.
(4) (1842) 1 Y. & C. Ch. 441.
(5) (1866) L. R. 1 Eq. 457, 460.
(6) 7 Cl. & F. 795.
(7) 1 Cl. & F. 20, 24.
(8) (1850) 4 De G. & Sm. 1.

I cannot believe his only intention was to appoint this lady sole executrix of the codicil. It must have been a disposition of some part of his property he had in mind, and the question is what part? It is I think helpful first to read the codicil omitting the words of exception "not bequeathed by the above will." With this omission the material part reads "The residue of my estate I give and bequeath to Mabel Abbie Locock absolutely." To what does that refer? Was the testator contemplating the true residue of his estate, that is, such surplus as would be left after payment of his debts and funeral and testamentary expenses and satisfying the prior gifts in the will, or was he dealing only with so much of that surplus as might ultimately fail to reach its intended destination under the terms of the will—what has been referred to as a residue of residue? I think if the words of exception are omitted the codicil ought to be construed as a true residuary gift, that is to say, as a gift of the whole residue to Miss Locock as residuary legatee in substitution for the residuary legatees named in the will. To what extent is this meaning cut down by the words of exception?

On behalf of Miss Locock it is urged that to construe these words literally would be to negative the existence of any testamentary intention on the part of the testator. The residue including any lapsed legacies, it is pointed out, is effectually disposed of by the will, and a bequest of so much of an already bequeathed residue as is not bequeathed is wholly inoperative and the negation of any testamentary intention. On the other hand it is argued that looking at the nature of the residuary bequests in the will it may well have been that at the date when the codicil was executed the testator had come to entertain some doubts whether the residuary bequests in the will would all be effective, and it is suggested that he intended by the codicil to provide against a possible partial intestacy by bequeathing to Miss Locock so much of his residuary estate as events might prove not to have been effectually disposed of by his will.

I feel a difficulty in adopting the construction contended for on behalf of Miss Locock. To do so would be to attach no meaning to the words of exception—to treat them as merely redundant. It is of course true that the language of testators is constantly

EVE J.
1915
STOODLEY, *In re.* HOOSON *v.* LOCOCK.

redundant. Such an expression as "the residue of my estate not hereinbefore disposed of" is of frequent occurrence, but when I am faced with the difficulty of reconciling two apparently contradictory dispositions I cannot, I think, safely disregard the words of exception and treat them as merely redundant. I must, if possible, attach a meaning to them which will remove the apparent contradiction. I agree that were I inclined to the view put forward on behalf of Miss Locock I could perhaps adopt it on the authority of the decision in *Earl of Hardwicke* v. *Douglas* (1), but in so doing I feel I should be disregarding the rule of construction which Mr. Farrer has quoted from the case of *Hearle* v. *Hicks* (2) to the effect that a clear unambiguous gift in a will can only be revoked by codicil by words at least equally clear and unambiguous as those of the original gift. I do not think the words here are so clear and the meaning so unambiguous as to lead to the conclusion that the testator contemplated the revocation of the residuary gifts in his will. It is perhaps a matter of conjecture what the testator really did mean, but I think that the intention as expressed in the codicil is to give Miss Locock such portion (if any) of the residue as may ultimately turn out not to have been effectually disposed of by the will, and no more, and I so hold.

Solicitors: *J. H. Pitchforth; Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol; Bridges, Sawtell & Co.; Wansey, Stammers & Co., for E. Lee Michell, Wellington, Somerset.*

(1) 7 Cl. & F. 795. (2) 1 Cl. & F. 20, 24.

G. M.

In re CLERKE.

CLOWES *v.* CLERKE.

EVE J.
1915
July 6, 16.

Will—Construction—Real Estate—Devise to A. "or his issue"—Estate Tail—Words of Limitation not of Substitution.

By his will a testator, who died in 1870, gave certain lands to be possessed by his son H. for his life, and on his death to revert to his issue in such proportions as he by his last will might direct, "and in default of such issue him surviving, then to revert to his brother, Shadwell Henry Clerke, or his issue."

H. died without issue in 1914, his brother S. H. C. having predeceased him leaving three children, and one of those children had three children living at the date of H.'s death. By his will S. H. C. purported to dispose of the realty in question:—

Held, that the devise to S. H. C. or his issue gave him an estate tail, the words being words of limitation and not of substitution.

ADJOURNED SUMMONS.

By his will, dated July 27, 1866, Lieutenant-General St. John Augustus Clerke, of 69, Mountjoy Square, Dublin, after making certain specific and pecuniary bequests, gave and bequeathed to his son Holt Waring Clerke all his right, title, and interest in lands at Ballyregan, Mamore, Clashdune, and Skibbeteen (subject to the payment of an annuity to his daughter during the lifetime of his wife), to be possessed by his son Holt for his lifetime, with power to charge them with a jointure of 50*l.* a year for the life of his widow, and "on his death to revert to his issue in such proportions as he by his last will might direct, and in default of such issue him surviving, then to revert to his brother Shadwell Henry Clerke, or his issue."

The testator made other bequests of realty to his son Shadwell Henry Clerke, and appointed his wife, Louisa, his cousin John William Clerke, and Captain Holt Waring Clerke, executors and trustees of his will. By a second codicil to his will the testator appointed his son Shadwell Henry Clerke executor and trustee of his will in conjunction with the previously named executors and trustees.

The testator died on January 17, 1870, and his will and two

EVE J.
1915
CLERKE, *In re.* CLOWES *v.* CLERKE.

codicils (the first not affecting the above disposition of property) were duly proved on February 16, 1870, by Shadwell Henry Clerke alone, power being reserved to the other executrix and executors to prove.

Louisa Clerke died on May 29, 1880. John William Clerke died on February 24, 1890, and Holt Waring Clerke on December 5, 1914, without having been married.

Shadwell Henry Clerke died on December 20, 1891, leaving three children, the defendants St. John Gervaise Shadwell Clerke, Augustus Basil Holt Clerke, and Henrietta Frances Beresford Clerke. St. John G. S. Clerke was married but had no issue. A. B. Holt Clerke was married and had three children, all infants, who were also defendants to the action. Henrietta F. B. Clerke was still unmarried.

By his will, dated July 25, 1889, Shadwell Henry Clerke gave all his "reversionary interest expectant and contingent on the decease without issue" of his brother Holt Waring Clerke in all the land, houses, and hereditaments in Ireland of or to which he was entitled at his decease, or of which he had power to dispose by will, as to such parts as were of freehold tenure to Holt Waring Clerke and Aubrey St. John Clerke, their heirs and assigns, to the use of his son St. John Gervaise Shadwell Clerke for life, and after his decease to the use of the children or remoter issue of his said son St. J. G. S. Clerke as he should by deed or will appoint, and subject thereto to the use of all his children in equal shares as therein provided, with remainder to uses in favour of Augustus Basil Holt Clerke and his children or remoter issue, with remainder to the use of his daughter Henrietta Frances Beresford Clerke absolutely. The testator declared that, as to the hereditaments in which his brother Holt W. Clerke had a life interest under the will of his father, each of his said children should, before taking any benefit under the will, execute a deed whereby all such estate and interest as they might have in the said hereditaments should be conveyed and assured to the trustees to the uses and subject to the powers and provisions thereinbefore declared concerning the same. The will of Shadwell Henry Clerke was duly proved on February 10, 1892, by Aubrey St. John Clerke alone.

On November 10, 1893, a disentailing deed of the property in question was executed by St. J. G. S. Clerke, Augustus B. Holt Clerke, and Henrietta F. B. Clerke for the purpose of fulfilling the condition imposed by the said will.

On July 5, 1909, the plaintiff, Richard Percy Clowes, was appointed a trustee of the will of St. John Augustus Clerke, and was now the sole trustee.

All the said freehold lands and houses in Ireland were sold in the years 1909, 1910, and 1911 by the trustees of the will of St. John Augustus Clerke under the provisions of the Irish Land Acts.

Doubts having arisen as to the persons entitled to the proceeds of sale, an originating summons was taken out by the plaintiff, Richard Percy Clowes, as the sole trustee of the will of St. John Augustus Clerke, to determine (1.) what persons were by the terms of the said will entitled to the proceeds of sale of these freehold lands on the death of Holt Waring Clerke without issue; and (2.) what was the effect, as regards such property, of the will of Shadwell Henry Clerke purporting to dispose thereof, and of the subsequent indenture of November 10, 1893.

Ernest Cockle, for the trustee of the will.

C. D. Myles, for the three children of Shadwell Henry Clerke. I submit that by this devise an estate tail is given to Shadwell H. Clerke. A gift to a person or his issue in the case of personal estate is, no doubt, substitutional, but in the case of real estate these words confer an estate tail, unless there are words in the will which show that it could not have been the intention of the testator: Hawkins on Wills, 2nd ed. p. 222; Theobald on Wills, 7th ed. p. 411; *In re Ibbetson* (1); *Parsons* v. *Parsons* (2); *Wingfield* v. *Wingfield*. (3) Those cases do not touch the case of real property, as they were cases of bequests of personalty.

Where the testator has clearly indicated his intention that such words are to be treated as words of substitution the Court gives effect to it: *Keay* v. *Boulton* (4); *Parkin* v. *Knight*. (5)

(1) (1903) 88 L. T. 461.
(2) (1869) L. R. 8 Eq. 260.
(3) (1878) 9 Ch. D. 658.
(4) (1883) 25 Ch. D. 212.
(5) (1846) 15 Sim. 83.

EVE J.
1915
CLERKE, *In re.* CLOWES *v.* CLERKE.

There have been cases since the Wills Act where "or" has been construed "and" in a gift to named persons "or their lawful heirs": *Harris* v. *Davis* (1); *Greenway* v. *Greenway* (2), where a gift to persons "or the heirs of their bodies" was held to give an estate tail.

R. Wright Taylor, for the three infant grandchildren of Shadwell H. Clerke. I contend that there was in this case a substitutionary gift to the issue, and an estate tail was not given to S. H. Clerke. The question is are the words "or his issue" words of limitation or of purchase? Here it is submitted they are words of purchase, and the issue take as joint tenants. Before 1838, when the Wills Act was passed, there existed a benevolent rule of construction that, in order to avoid a lapse owing to the death of the devisee in the lifetime of the testator, "or" should be construed "and," so as to confer an estate tail. But since the Wills Act the reason for that rule has fallen to the ground, and it is no longer applicable. In this will there was a gift in remainder to the issue of Holt Waring Clerke, and in that part of the will the words "to his issue" could not be construed as words of limitation. That indicates the intention of the testator. If the Court is against that contention, then I submit that the old rule has ceased to operate, as is suggested by Jarman on Wills, 6th ed. pp. 612, 1316. There is no distinction between real and personal property in the construction of a substitutionary gift. The old rule was stated in *Read* v. *Snell.* (3) The cases of *Wingfield* v. *Wingfield* (4), *Parsons* v. *Parsons* (5), and *Keay* v. *Boulton* (6) are in my favour. The modern tendency, as evidenced by the text-books, is not to change "or" into "and" in gifts of this nature. In *Girdlestone* v. *Doe* (7) "or" was read disjunctively and the gift to "B. or his heirs" held to be substitutional.

[EVE J. referred to *In re Ibbetson.* (8)]

C. D. Myles in reply.

Cur. adv. vult.

(1) (1844) 1 Coll. 416.
(2) (1860) 2 D. F. & J. 128.
(3) (1743) 2 Atk. 642, 645.
(4) 9 Ch. D. 658.
(5) L. R. 8 Eq. 260.
(6) 25 Ch. D. 212, 216.
(7) (1828) 2 Sim. 225.
(8) 88 L. T. 461.

July 16. EVE J. The gift I have to construe is contained in the will of the late Lieutenant-General St. John Augustus Clerke, who died on January 17, 1870. It is in these terms: "The said land and premises to be possessed by my son Holt for his lifetime (with power to charge them with a jointure of 50*l.* a year for the life of his widow) and on his death to revert to his issue in such proportions as he by his last will might direct, and in default of such issue him surviving then to revert to his brother Shadwell Henry Clerke or his issue."

Holt died without issue in December, 1914, his brother Shadwell Henry having predeceased him, leaving three children, and one of these children had three children living at the date of Holt's death.

The question is whether the gift to Shadwell "or his issue" gives him an estate tail or whether the words "or his issue" are to be read as words not of limitation but of substitution. If they are to be read in the latter sense, it is conceded that the three grandchildren and three great-grandchildren of the testator take as joint tenants.

Reliance was placed on the gift in remainder to the issue of Holt as supporting the substitutional construction, but I do not think any assistance can be derived from that—the gifts are quite independent, and there is nothing in the context which warrants me in treating the construction of the one gift as being in any way controlled by the other.

This reduces the matter in difference to the question whether there is any authority for the suggestion that the rules laid down in *Read* v. *Snell* (1), that a devise to "A. or his heirs" gives A. an estate in fee simple, and in *Harris* v. *Davis* (2) and *Greenway* v. *Greenway* (3), that a devise to "A. or the heirs of his body" gives A. an estate tail, have been altered in modern times in the case of wills coming into operation since the Wills Act.

The suggestion is to be found in Jarman on Wills, 6th ed., vol. i. p. 612, in Hawkins on Wills, 2nd ed. p. 222, and in Theobald on Wills, 7th ed. p. 411, and when one considers how

(1) 2 Atk. 645. (2) 1 Coll. 416.
(3) 2 D. F. & J. 128.

EVE J.
1915
CLERKE, *In re.* CLOWES *v.* CLERKE.

the rule would operate in the case of the death of A. in the lifetime of the testator, there is certainly much force in the observations of the late Mr. Jarman where he says: "The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime; in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse."

But on the other hand in both *Harris* v. *Davis* (1) and in *Greenway* v. *Greenway* (2) the wills construed were subsequent to the Wills Act, and no case has been cited which in terms throws any doubt upon the continued existence of the rule.

In one of the three cases on which Mr. Wright Taylor relied as indicative of a change in the rule, *Parsons* v. *Parsons* (3), the subject-matter of the gift was held to be personalty (to which the rule never applied), and it was there further admitted that the words "or their heirs respectively" were words of substitution, and in the other two, *Wingfield* v. *Wingfield* (4) and *Keay* v. *Boulton* (5), the Court in each case construed the will as clearly intending substitution and not succession. See in particular the passage in Hall V.-C.'s judgment (6) commencing with the words "Where, as in the present case, the trust or limitation is such that the heirs take as substitutes," and the opening paragraph of Pearson J.'s judgment. (7)

It may be that the rule—like some others—survives the mischief it was originally forged to avert and is no longer necessary, but I cannot, as matters stand, bring myself to hold that it does not in fact survive, and I think it applies in this case and that Shadwell took an estate tail.

Solicitors: *Nye, Moreton & Clowes.*

(1) 1 Coll. 416.
(2) 2 D. F. & J. 128.
(3) L. R. 8 Eq. 260, 261.
(4) 9 Ch. D. 658.
(5) 25 Ch. D. 212.
(6) 9 Ch. D. 665.
(7) 25 Ch. D. 215.

G. M.

In re CADBURY BROTHERS' APPLICATION.

SARGANT J.

1915

June 21, 22.

[1915 C. 597.]

Trade Mark—Label—Disclaimer—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 15.

The discretion conferred on the registrar or the Court by s. 15 of the Trade Marks Act, 1905, to require a disclaimer of any right to the exclusive use of any part or parts of a trade mark should not be exercised so as to place upon the register disclaimers which are unnecessary in law.

The applicants applied to register as a trade mark a label consisting of a wreath of five Tudor roses enclosing the words "Tudor Chocolates made by Cadbury," the word "Tudor" being the most prominent word. The registrar refused the application except on the condition of the applicants disclaiming any right to the exclusive use of the word "Tudor," stating as his reason that of recent years it had been the practice of the Office in every case where a prominent feature of a mark was a word which could not be registered alone to insist that a disclaimer of that word be put in so as to make the position clear commercially as well as legally:—

Held, that the registrar was wrong in acting on any such general rule of practice, and that the registration in the present case ought to proceed without insisting on any disclaimer.

In re Albert Baker & Co.'s Application [1908] 2 Ch. 86 followed.

This was an application by Cadbury Brothers, Limited, that the decision of the Registrar of Trade Marks, dated September 30, 1914, whereby he refused registration of the applicants' trade mark No. 355,395, in class 42 in respect of chocolates, might be reversed, and that he might be directed to proceed with such application.

The trade mark in question was a label consisting of a wreath or border of five Tudor roses enclosing the words "Tudor Chocolates made by Cadbury," the word "Tudor" being in the most prominent type.

A previous application by the applicants for the registration of the word "Tudor" alone, under s. 9, sub-s. 4, of the Trade Marks Act, 1905, had been refused, and a similar application for registration under s. 9, sub-s. 5, had been withdrawn; but evidence was now adduced by the applicants to show that for twelve or thirteen years the word "Tudor" had been distinctive

SARGANT J. 1915

CADBURY BROTHERS' APPLICATION, *In re.*

of the applicants' goods, and it was stated that the application under s. 9, sub-s. 5, was intended to be renewed.

The registrar refused the application except on the condition of the applicants disclaiming any right to the exclusive use of the word "Tudor." In stating the reasons for his refusal the registrar said: "The word 'Tudor' is the most prominent word on the mark, and is a word which could not be registered alone . . . . Of recent years it has been the practice of the Office in every case where a prominent feature of a mark is a word which cannot be registered alone to insist that a disclaimer of that word be put in so as to make the position clear commercially as well as legally. No disclaimer harms any one. It is a mere statement of legal position. It affects only the registration of the exact mark and has no bearing on rights arising aliunde. Therefore any disclaimer does no harm."

The applicants gave notice of appeal to the Board of Trade, who referred the appeal to the Court.

It appeared that three trade marks consisting of devices containing the word "Tudor" in respect of goods in class 47 had been advertised in the *Trade Marks Journal* for February 8, 1911, and September 6, 1911, in respect of which no similar disclaimers of the word "Tudor" had been insisted on.

Walter, K.C., and *L. B. Sebastian*, for the applicants. We do not dispute that the registrar or the Court has power under s. 15 of the Trade Marks Act, 1905 (1), to require a

(1) Trade Marks Act, 1905, s. 15: "If a trade mark contains parts not separately registered by the proprietor as trade marks, or if it contains matter common to the trade or otherwise of a non-distinctive character, the registrar or the Board of Trade or the Court, in deciding whether such trade mark shall be entered or shall remain upon the register, may require, as a condition of its being upon the register, that the proprietor shall disclaim any right to the exclusive use of any part or parts of such trade mark, or of all or any portion of such matter, to the exclusive use of which they hold him not to be entitled, or that he shall make such other disclaimer as they may consider needful for the purpose of defining his rights under such registration: Provided always that no disclaimer upon the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made."

disclaimer of any right to the exclusive use of any part of the trade mark, but this is not a proper case for its exercise. The trade mark sought to be registered is the label as a whole, and the registration of the label will give no right to the exclusive use of the word "Tudor" standing alone. The disclaimer insisted on is therefore wholly unnecessary, and the new practice of the Office as stated by the registrar is a wrong one, and likely to lead to mischievous consequences by leading the public to suppose that they can make use of the word disclaimed without regard to the possible common law rights of the applicant in the word, which by virtue of the proviso to s. 15 are entirely unaffected by any such disclaimer, and thus giving rise to a number of passing-off actions. The present case is governed by *In re Albert Baker & Co.'s Application* (1), where Eve J. laid down that the condition of disclaimer under s. 15 is one for the imposition of which some good reason ought to be made out rather than one which ought to be imposed unless some good reason for the contrary is shown. See too *In re Smokeless Powder Co.'s Trade Mark.* (2)

Austen-Cartmell, for the registrar. Sect. 15 of the Trade Marks Act, 1905, has made a complete alteration in the old law, and under that section the registrar or the Court has a discretion to require a disclaimer of a right to the exclusive use of any part of the mark standing alone. That discretion was rightly exercised in the present case, especially having regard to the fact that the applicants, according to their own evidence, set up a right to the use of the word standing alone. If the word "Tudor" were struck out altogether the value of the trade mark would be gone. It is true that up to the year 1911 a different practice prevailed, but the present practice as stated by the registrar dates from that year and is a sound one. In *In re Albert Baker & Co.'s Application* (3) the Office was not represented, the contest being between two rival traders alone; and in that case Eve J. placed too much reliance on the old authorities prior to the Trade Marks Act, 1905, such as *In re Smokeless Powder Co.'s Trade Mark* (2), *In re Clément & Cie.'s Trade Mark* (4),

(1) [1908] 2 Ch. 86, 104, 105.
(2) [1892] 1 Ch. 590.
(3) [1908] 2 Ch. 86.
(4) [1900] 1 Ch. 114.

SARGANT J. 1915 CADBURY BROTHERS' APPLICATION, *In re.*

and *In re Faulder & Co.'s Trade Mark.* (1) The judgments of the Court of Appeal in *In re Application of Benz et Cie.* (2) are in favour of the decision of the registrar.

L. B. Sebastian in reply.

SARGANT J. This is an appeal referred to the Court by the Board of Trade from a decision of the registrar insisting that as a condition of proceeding with the registration of a certain trade mark there shall be a disclaimer by the applicants of any right to the exclusive use of the word "Tudor" which forms a part of the mark.

The trade mark which has been applied for is a trade mark containing the words "Tudor Chocolates made by Cadbury," and those words are contained in a border consisting of Tudor roses. The trade mark applied for is the whole device and no one particular portion of it; and, although the word "Tudor" is as a matter of fact in rather larger capitals than the word "chocolates" or the word "Cadbury," I am satisfied that the registration of the trade mark could not by any possibility give to the applicants any exclusive right to the use of the word "Tudor." That, however, does not conclude the matter, because s. 15 of the Trade Marks Act, 1905, expressly provides as follows: [His Lordship read s. 15 and continued.] In my opinion it is clear on the evidence that the word "Tudor" is not common to the trade, and it is also clear to my mind that the word "Tudor," as it has been used by Cadbury Brothers in relation to chocolates, is not matter of a non-distinctive character. It has denoted their goods, and therefore the jurisdiction of the Court arises, if at all, under the first branch of the hypothesis at the commencement of the section, namely, "If a trade mark contains parts not separately registered by the proprietor as trade marks."

I am not prepared to hold, and Mr. Walter did not ask me to hold, that the word "Tudor" was not a part of this trade mark within that section of the Act, and accordingly I must proceed upon the basis that the jurisdiction given by the section has arisen,

(1) [1902] 1 Ch. 125.
(2) (1912) 29 Rep. Pat. Cas. 357; on appeal (1913) 30 Rep. Pat. Cas. 177.

SARGANT J.

1915

CADBURY BROTHERS' APPLICATION, *In re.*

and that the registrar or the Court has a discretion to impose in a proper case a disclaimer by the applicants as a condition of the registration of the trade mark. The registrar in giving his decision insisting on the disclaimer says this: "The word 'Tudor' is the most prominent word on the mark and is a word which could not be registered alone." I agree that the word could not be registered alone, because it is a surname, although in the way in which it has in fact been used on this label it has not been used as a surname at all. Then the registrar states his reason for refusing the registration. "Of recent years it has been the practice f the Office in every case where a prominent feature"—not *the* prominent feature—"of a mark is a word which cannot be registered alone to insist that a disclaimer of that word be put in so as to make the position clear commercially as well as legally." It appears that the practice so stated has only originated during the last three or four years, because it happens that in the *Trade Marks Journal* for the year 1911 there are at least three instances of marks being advertised containing this word "Tudor" displayed in a rather more prominent way than in the present case, without any condition having been imposed. The practice, therefore, is one of quite recent origin, and the registrar has stated that it has in fact been adopted since 1911 because it was found that illegitimate use has been made in some instances of the appearance in a trade mark of a word of this character. On the other hand I think that the commercial case made on behalf of the applicants is also well founded, namely, that they would by disclaiming on their trade mark any right to the exclusive use of the word "Tudor" practically be inviting the public to disregard such common law rights as they may have acquired to the use of the name, so that the result would be to give rise to a crop of passing-off actions.

It is quite true that s. 15 contains an ultimate proviso "that no disclaimer upon the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made"; but commercial persons do not go about with their heads full of the provisoes to sections of Acts of Parliament, and I can quite see that the disadvantage to the applicants of the

SARGANT J. insertion on the register of such a disclaimer, unless it is really necessary, might well outweigh the advantage to be derived by the public in general from the impossibility of its being said that there was some statutory right as distinguished from a common law right to the exclusive use of the word "Tudor" in connection with chocolates.

1915

CADBURY BROTHERS' APPLICATION, *In re.*

It seems to me manifest that the registration of this trade mark cannot give rise to any rights except a right to the mark as a whole. It cannot give any statutory rights at all in respect of the word "Tudor"; and, that being so, it is inexpedient to place on the register an unnecessary disclaimer, because the effect of so doing is to unsettle the law and give rise to doubts in other cases, where such disclaimers are not inserted. If the registrar had merely exercised his discretion in one particular case on one particular application, it may be that I should have found great difficulty in overruling that discretion, having regard especially to what was said in the well-known case of *Eno* v. *Dunn* (1); but here the registrar appears to be insisting on this disclaimer in accordance with the general practice of the Office which he has stated. In my judgment that practice is one which is far too wide and would result as a general rule in placing on the register a vast crop of unnecessary disclaimers.

Several cases have been cited to me, many of them under the earlier Acts. I do not think that much advantage is to be derived from looking at those decisions, inasmuch as s. 15 of the Trade Marks Act, 1905, appears to have made an entirely new start in this respect. But I may say that the case made for insisting upon a disclaimer on the present application is very much weaker than the case made in *In re Albert Baker & Co.'s Application* (2) decided by Eve J. I agree with the observations of the learned judge (3) to the effect that the result of the Act is to throw the onus of justifying a disclaimer on those who seek to have it inserted. It is quite true that in that case the Office was not represented, but nevertheless the decision of the learned judge being based upon

(1) (1890) 15 App. Cas. 252. (2) [1908] 2 Ch. 86.
(3) [1908] 2 Ch. 104, 105.

general principles is just as binding as if the Office had been represented,—indeed if the Office had been represented I think that there can be no question that the decision would have been the same, because at that time the Office had not adopted the practice which has been adopted since the year 1911.

I am of opinion therefore that this appeal must be allowed, and that the registrar should be directed to proceed with the application without imposing any condition as to disclaimer.

Solicitors: *Timbrell & Deighton*; *The Solicitor to the Board of Trade*.

A. C.

In re RUBEN.

[1915 R. 758.]

Trading with the Enemy — Enemy Property — Policies of Life Assurance deposited with Enemy as Security—Policies out of Jurisdiction—Application to vest Policies or Right to receive Policy Moneys in Custodian — Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 4, *sub-s.* 1.

An English firm consisting of two partners deposited with one R., an alien enemy resident in Germany, certain policies of assurance on the respective lives of the partners as security for certain bills which he had accepted on their behalf. The firm subsequently became bankrupt. One of the partners having died and the policy moneys under two of the policies having thereupon become payable, the trustee in the bankruptcy applied, under s. 4 of the Trading with the Enemy Amendment Act, 1914, for an order vesting in the custodian the two policies, or in the alternative the right to receive the policy moneys thereunder:—

Held, that under the Act the only property which could be vested in the custodian was enemy property; that the charge on the policies was enemy property, but that the applicant was not interested in it, and consequently that the application must be dismissed.

MOTION.

On May 7, 1915, the trustee in bankruptcy of the estate of Fritz Magnus Christian Jacobsen and Walter Eliezer Jones, who traded together in co-partnership under the style or name of F. Jacobsen & Co., took out an originating summons under

YOUNGER J. 1915 RUBEN, *In re.*

s. 4 of the Trading with the Enemy Amendment Act, 1914 (1), for an order that the property mentioned in the summons might vest in the custodian and that there might be conferred on him such powers of selling, managing, and otherwise dealing with the property as might seem proper.

The property referred to in the summons was the following:—

"1. Policy No. 24,708 in the Rock Life Assurance Company (now incorporated with the Law Union and Rock Insurance Company, Limited,) for 3000*l.* on the lives of the said Fritz Magnus Christian Jacobsen, deceased, and Walter Eliezer Jones.

"2. Policy No. 30,542 in the Commercial Union Assurance Company, Limited, for 1500*l.* on the life of the said Fritz Magnus Christian Jacobsen, deceased, alleged to have been issued for the sole benefit of the said Marie Jacobsen.

"3. Policy No. 12,130 in the Svea Fire and Life Insurance Company of Gothenburg for kroner 10,000 on the life of the said Fritz Magnus Christian Jacobsen, deceased.

"4. Policy No. 25,268 in the Alliance Assurance Company, Limited, for 200*l.* on the life of the said Walter Eliezer Jones.

"5. Policy No. 72,413 in the Life Association of Scotland for 500*l.* on the life of the said Walter Eliezer Jones."

The following statement of the facts is taken from the judgment of Younger J.:—"The applicant is the trustee in bankruptcy of two persons, Fritz Magnus Christian Jacobsen, now said to be dead, and Walter Eliezer Jones, who traded together in co-partnership under the style or name of F. Jacobsen & Co.

(1) Trading with the Enemy Amendment Act, 1914, s. 4, sub-s. 1: "The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government Department, by order vest in the custodian any such real or personal property as aforesaid, if the Court or the judge is satisfied that such vesting is expedient for the purposes of this Act, and may by the order confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Court or judge may seem proper.

"Ruben Elias Ruben, the enemy, was apparently in the habit of accepting bills for the accommodation of the bankrupt firm, and it is stated by the applicant in his affidavit in support of this summons that the enemy claims the policies in question which are in fact the property of the firm as security for certain bills which he had accepted on behalf of the bankrupts. The applicant, however, goes on to state that the bills in question or renewals of the bills or of some of them have been discounted by the enemy with, and that they are now held by, creditors in England who have claimed against the estate of the bankrupts. The applicant accordingly says that he does not admit the claim of the enemy to hold the policies as security, and he adds, and the fact was confirmed at the hearing in chambers, that the originals of the policies are held by the enemy himself, who of course is ex necessitate rei beyond the jurisdiction of the Court.

"The applicant further with regard to one of the policies, that in the Commercial Union Assurance Company, states that Marie Jacobsen, the widow of the bankrupt Jacobsen, claims the policy as her own, but he adds that that policy is also held by the enemy as security and that he does not admit the widow's claim. He concludes his affidavit by reasserting as trustee of the bankrupts' estate his contention that he is interested in all the policies, and he asks that the moneys payable thereunder respectively be ordered to be paid to the Public Trustee as custodian under the Act.

"By the terms of his summons, however, the applicant only asks that the policies themselves may vest in the custodian, and it was admitted at the hearing in Court that having regard to the fact that the policies are not within the jurisdiction an order to that effect, even if made, would be quite ineffective.

"This admission seems to dispose altogether of the application so far as it relates to the policy numbered 1 in the summons, which is apparently a policy on the joint lives of the bankrupts; and to the policies numbered respectively 4 and 5, which are policies on the life of the bankrupt Walter Eliezer Jones, who is still alive.

"It was, however, contended that by amendment the summons

YOUNGER J. 1915 RUBEN, *In re.*

might be made effective as to the policy numbered 2, being the policy for 1500*l.* issued by the Commercial Union Assurance Company on the life of the deceased bankrupt—and the subject of his widow's claim—and also as to the policy numbered 3, being one for 10,000 kroner on the life of the same assured and issued by the Svea Fire and Life Insurance Company of Gothenburg. The moneys on these policies are now payable by reason of the death of Mr. Jacobsen, the assured, and the applicant asked for leave to amend his summons by claiming in the alternative that the right to receive the policy moneys on both should vest in the custodian.

"I am not satisfied that the evidence as it stands is sufficient to support that amendment even if allowed, but I do not doubt that it could, if required, be supplemented to the extent necessary, and it will be convenient to deal with the applicant's claim as if the amendment asked for were made and sufficiently supported by evidence."

On June 29, 1915, the summons came before Younger J. in chambers and was opposed by the custodian. His Lordship held that on his own evidence the applicant was not in a position to assert that the policies were property "belonging to or held or managed for or on behalf of an enemy" within the meaning of s. 4 of the Trading with the Enemy Amendment Act, 1914, and made an order dismissing the summons.

The applicant now moved to discharge that order.

E. W. Hansell, for the motion. The applicant is "interested" in the policies within the meaning of s. 4, sub-s. 1, of the Act. His interest is that of the owner of the equity of redemption in the policies, which are the subjects of the equitable charge in favour of the enemy. There is no reported case upon the point. In *In re Bank für Handel und Industrie* (1) Warrington J. in the course of the argument said: "The Act appears to point to some definite property which I can vest. I am asked to vest in the custodian what is in reality a litigation." In the present case there is definite property, namely, the policies, which can be vested in the custodian. In the last sentence of his first judg-

(1) [1915] 1 Ch. 848, 850, 851.

ment in the case referred to Warrington J. said: "I do not mean to say that an order cannot be made vesting a debt if the debt is admitted." Here the moneys are admitted to be due on two of the policies of Jacobsen's life. There are no reasons of public inconvenience why the order asked for should not be made.

Austen-Cartmell, for the custodian.

[YOUNGER J. There is only one point on which I will trouble you, Mr. Austen-Cartmell. Assuming that the enemy here is a mortgagee and that the applicant is the owner of the equity of redemption in the mortgaged property, is this a case in which the order asked for could be made ?]

An order could be made on the application of the custodian but not on that of the applicant. The charge, if any, upon the policy moneys in favour of Ruben is property "belonging to or held or managed for or on behalf of an enemy" within s. 4, sub-s. 1, of the Act. But the charge is not property in which the applicant is interested. His only interest is in the equity of redemption. The present application is really that of a mortgagor seeking to have the whole of the mortgaged property vested in the custodian and not merely the equity of redemption. The custodian does not desire that a vesting order should be made. He is satisfied that the policy moneys are quite safe.

[He was stopped.]

G. M. Simmonds, for Ruben.

YOUNGER J. I will give the reasons for my judgment on Tuesday next.

July 13. YOUNGER J. read the following judgment:—This was a motion to discharge an order made in chambers dismissing a summons under the Trading with the Enemy Amendment Act, 1914, which asked that certain policies of life insurance therein specified should vest in the custodian.

The summons was based upon the view that the applicant is interested in the policies within the meaning of the Act, they being described in the summons as policies held on behalf of the enemy Ruben Elias Ruben. But the application in its main features is quite unlike those to which we have become accustomed in the administration of the Act, and it presents the appearance

YOUNGER J. 1915 RUBEN, *In re.*

of a well-intentioned experiment to test the scope of the powers conferred by the Act upon the Court and the custodian, and to see how far by means of this Act relief may be obtained against an enemy at the instance of an applicant who cannot enforce his claims during the war in ordinary course of law. [His Lordship then stated the facts as above set out and continued :]

Put shortly, then, the applicant, while asserting that on behalf of the bankrupts' estate he is entitled to the policy moneys in question, and while denying that the enemy has any valid claim thereto, asks that under the Act the right to recover the whole of these moneys may vest in the custodian, and he justifies his right to make that claim by affirming that he is a person interested in these moneys within the meaning of the Act. It is manifest, I think, that if such a vesting order were made it would, if acted upon by the custodian, be productive of nothing but prolonged and probably fruitless litigation. Without delivery up of the policies the insurance companies could not be required by the custodian to pay over the policy moneys to him, his sole right to receive them being that of the enemy, in whose favour no assignment of any policy has either been executed or notified, and, even if one ignores or discounts the possible claim of any other person validly deriving title to the policies under the enemy by deposit or otherwise, the custodian could only receive payment of the policy moneys assured by the Commercial Union after he had disposed of Mrs. Jacobsen's claim to have them paid to her.

Naturally under these circumstances the custodian declines so far as he properly may, to have anything to do with a claim to these policy moneys on behalf of the enemy, and I give a short answer to the summons, even if it be amended as asked, if I say, as I do say, that I am not satisfied that the vesting is expedient for the purposes of the Act, and moreover that I am satisfied that the order, objected to as it is by the custodian, is one which in the exercise of my discretion I ought not to make.

But there is another objection to the summons which goes to the root of the whole matter. In my opinion the applicant is not interested in anything which by the order can alone be vested in the custodian and is not in a position to make the application at all.

I arrive at this conclusion on a consideration of the general scope of the Act. A careful perusal of it shows that it is concerned, and concerned only, with enemy property; that is the plain effect of the Act as a whole.

First, if one looks at the preamble, it recites that "it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as 'enemies'), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies." Thus, in the preamble the only property referred to is property belonging to enemies. Again, when one looks at s. 1, which deals with the constitution of the office of custodian of enemy property, one finds that the custodian is appointed "for the purpose of receiving, holding, preserving, and dealing with such property as may be paid to or vested in him in pursuance of this Act." Proceeding to ascertain what that property is one finds in s. 2, sub-s. 1, that the property payable to the custodian is "Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits." So the only thing to be paid to the custodian is money which but for the war would have been payable and paid to or for the benefit of an enemy. Again, when one looks at s. 3, which requires certain returns to be made to the custodian, one finds that it is expressly provided (sub-s. 1) that "Any person who holds or manages for or on behalf of an enemy any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), shall, within one month after the passing of this Act or if the property comes into his possession or under his control after the passing of this Act, then within one month after the time when it comes into his possession or under his control, by notice in writing communicate the fact to the custodian . . . ." So, again that section deals only with property held or managed for or on behalf of an enemy. Then

YOUNGER J. 1915 RUBEN, *In re.*

when one comes to s. 4, which is the section now in question, one finds it is provided (sub-s. 1) that "The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy . . . . by order vest in the custodian any such real or personal property as aforesaid." There again the application is to be made either by a creditor or by any person interested in property belonging to or held or managed for or on behalf of an enemy. Also it seems plain that a person "interested" there means a person interested under the enemy and not a person claiming adversely to the enemy. Proceeding further with the Act one finds in s. 5, sub-s. 1, "The custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct." That is to say that there are directions in s. 5 as to how the property so vested in the custodian shall be dealt with. And it being thought desirable to make some provision for payment before the termination of the war of debts of the enemy out of his property vested in the custodian, it is by sub-s. 2 provided: "The property held by the custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the custodian may, if so authorized by an order of the High Court or a judge by whose order any property belonging to an enemy was vested in the custodian under this Act, or of any Court in which judgment has been recovered against an enemy, pay out of the property paid to him in respect of that enemy the whole or any part of any debt due by that enemy and specified in the order." So again the property vested in the custodian is property of an enemy out of which by virtue of a proper order his debts may be paid.

It appears, therefore, on a consideration of these sections of the

Act that all that can be vested in the custodian is enemy property, and it is in the property of an enemy that an applicant other than the custodian must be interested. The applicant here is not interested in any enemy property: he claims that the whole property is his own and that no part of it is the enemy's, and even if it be the fact that the enemy has a lien on the policy moneys which lien might be the subject of a vesting order, still the applicant is not interested in that lien: his interest is an interest against and in derogation of it.

Of course the applicant is not a creditor of the enemy: the enemy would contend that if the applicant be anything he or the estate which he represents is debtor to him for the moneys which he claims to be secured on the policies in his hands. In any view of the case, therefore, the applicant has in my opinion no locus standi to apply to the Court.

In truth the object of the applicant is to utilize the Act for a purpose for which it was not intended; it is to get these policies which he claims to be his and which are wrongfully detained from him by the enemy vested in the custodian, not that they may be administered and held as enemy property, but that they may in due course be handed over to himself as his own. In other words the custodian is to be utilized as a convenient medium for the recovery for the applicant of property of the bankrupts which so long as the war lasts he cannot recover for himself as their trustee in bankruptcy. This is not the purpose or object of the Act, and in my opinion the order made in chambers was perfectly right and this motion must be refused, the costs of the custodian to be paid by the applicant. There will be no order as to the enemy's costs: he has not brought the policies within the jurisdiction of the Court or rendered any assistance in the matter.

Solicitors: *Lumley & Lumley; Coward & Hawksley, Sons & Chance; Oliver & Nutt.*

W. I. C.

JOYCE J.
1915
Feb. 3, 4, 5, 9, 17.

FRED. WILKINS AND BROTHERS, LIMITED *v.* WEAVER. (1)

[LIVERPOOL DISTRICT REGISTRY.]

[1912 F. 2379.]

Master and Servant—Contract of Service—Breach—Notice of Breach to Subsequent Employer—Continuation of Employment after Notice of Breach of Prior Contract—Harbouring—Liability of Employer.

Where a person employed under a contract of service for a term leaves his employment, and before the expiration of the term is taken into the service of another and in breach of that contract employed by him with knowledge thereof, the new employer is liable to an action at the suit of the former.

Blake v. *Lanyon* (1795) 6 T. R. 221 and *De Francesco* v. *Barnum* (1890) 63 L. T. 514 followed.

Witness Action.

The plaintiff company carried on the business of theatrical furnishers in Liverpool and London, and the defendant company, Wilson Rae, Pixton & Co., Limited, carried on a similar business in London.

By an agreement dated September 9, 1910, between the plaintiff company and the defendant Weaver it was agreed that the company should employ the defendant Weaver and that he should serve the company as joint manager of the fibrous plaster and decorating department of the plaintiff company's business for a term of three years from October 1, 1910, at a fixed salary of 3*l.* a week and certain bonuses as therein mentioned.

Clause 2 of the agreement provided that during the term of his employment thereunder the joint manager should

"(*a*) in all respects carry out and use his best endeavours in carrying out the objects of the company . . . .

"(*b*) Devote the whole of his time and attention to the duties of joint manager and not be in any way connected with any other company business or concern without the consent of the company testified by a resolution of the directors.

"(*c*) The joint manager shall devote himself entirely to the said business and shall personally attend thereto . . . ."

(1) Reported by special request.

(*d*) [prohibition of disclosing trade secrets or confidential information.]

(*e*) [prohibition of using the company's name, &c., after determination of employment.]

At the time when this agreement was entered into, William Wilson Rae, who subsequently became managing director of the defendant company, was in the employment of the plaintiff company. It was part of his duty to arrange the agreement; he assisted in preparing it and was aware of the terms upon which Weaver was employed by the plaintiff company. Rae terminated his employment with the plaintiff company on April 2, 1912, and on May 29, 1912, the defendant company was registered. There were five directors, of whom Rae was one.

At the trial of the action, Rae deposed that on two occasions in the earlier part of August, 1912, the defendant Weaver saw him at the offices of the defendant company, told him that he was dissatisfied with the plaintiffs, and asked whether the defendant company could find a vacancy for him, to which Rae replied that he knew of the agreement of Weaver with the plaintiffs and that until he could say that he had definitely cancelled this agreement with them the question of giving him an appointment could not be considered. At a third interview, on August 26, Rae alleged Weaver stated that he had arranged with the plaintiffs for the cancellation of the agreement and that he was free to come to the defendant company by the end of October or the beginning of November. Terms of his employment by the defendant company were then discussed and were embodied in a letter sent on the next day by the defendant company to Weaver. A draft agreement was prepared by Rae on behalf of the defendant company in almost identical terms with the agreement of September 9, 1910, a copy of which Rae, who prepared that agreement originally, had in his possession, and on September 27 the defendant company's seal was affixed to this new agreement. It was contemplated that Weaver should take up his work with the defendant company on November 1, but he nevertheless continued with the plaintiff company after that date.

On November 10, 1912, Weaver gave notice in writing to the plaintiff company that he intended to sever his connection with

JOYCE J. 1915 FRED. WILKINS AND BROTHERS, LIMITED v. WEAVER.

them on November 15, 1912, and on November 25, 1912, while the plaintiffs were engaged in carrying out important contracts under his superintendence, after an interview in the morning with the managing director of the plaintiff company, who protested against his leaving in breach of his agreement, he went away and actually entered the service of the defendant company.

Upon the following morning, November 26, the managing director of the plaintiff company had a conversation upon the telephone with Rae, discussed the matter, protested against the defendant company employing Weaver, and intimated that they would have to protect their interests and might join Rae in any proceedings to be taken. The managing director of the plaintiff company deposed that, as he understood, Rae was to write to him upon the subject, no such letter being received. On December 18, 1912, the plaintiff company's solicitors wrote to the defendant company, and after referring to the defendant Weaver's agreement with the plaintiffs, continued: "The agreement you will remember was arranged by Mr. Rae and the contents of it are therefore familiar to him. Weaver left our clients' employment without their consent, and Mr. Wilkins instructs us that he informed your Mr. Rae of this by telephonic communication in November last, but in any case we now give you formal notice of the fact that Weaver has improperly left his employment with our clients and we must call upon you to cease employing him. . . . . We shall be glad to hear by return of post that you are prepared to comply with our request, otherwise our clients will have no option but to take measures to protect their interests."

To that letter the defendant company replied on the following day acknowledging its receipt and saying they had forwarded it to their solicitors, from whom the plaintiffs' solicitors would doubtless hear.

Weaver continued in the defendant company's service, and on December 21, 1912, the plaintiffs issued the writ in this action. By paragraphs 5, 6, and 8 of their statement of claim they alleged that the defendant company at the date when Weaver entered their service, or alternatively on December 19, 1912, had full knowledge or notice of the agreement of September 9, 1910,

and that they knowingly and for their own ends procured or induced the defendant Weaver to leave the service of the plaintiffs and enter their own service, or, alternatively, to continue in their service, in breach of the agreement; and by continuing to employ him after such notice had knowingly assisted him to commit a breach of his agreement, and the plaintiffs alleged that they had thereby suffered damage. The plaintiffs claimed (1.) an injunction restraining the defendant company until October 1, 1913, from continuing to employ the defendant Weaver in their business, or inducing or assisting him to commit a breach of his agreement with the plaintiff company; (2.) an injunction restraining the defendant Weaver from committing any breach of the provisions of clauses 2 (*d*) and (*e*) of his agreement so far as the same related to the period after the determination of his employment by the plaintiffs; (3.) payment by the defendant Weaver of 100*l*. as liquidated damages for the breach of clauses 2 (*d*) and (*e*) of the agreement; and (4.) damages against both the defendants. The plaintiffs gave particulars of four of their customers whom Weaver had solicited.

The defendant company in their defence alleged that the defendant Weaver was entitled to leave the plaintiffs' service on November 23, 1912, notwithstanding his agreement by reason of refusal or neglect on their part to pay him bonuses to which he was entitled under the agreement and to render him proper accounts or certificates showing the amount thereof; and that the directors' belief that Weaver was so entitled, even if erroneous, was sufficient to relieve the defendant company from liability.

In his defence the defendant Weaver alleged that in consequence of the wilful and persistent refusal and neglect of the plaintiffs to pay him the full amount of the bonuses to which he was entitled under his agreement or to render him any proper account of the same he was entitled to leave their service, and he counterclaimed for an account and payment. The plaintiffs replied denying these allegations.

Hughes, *K.C.*, and *Courthope Wilson*, for the plaintiffs. This is an action against Weaver for breach of an agreement under

JOYCE J.
1915
FRED. WILKINS AND BROTHERS, LIMITED v. WEAVER.

which he was bound to serve as manager, and against the defendant company, which induced him to go and serve them instead of us. It is only a question of damages now, not of an injunction, as the period has expired.

De Francesco v. *Barnum* (1) shows that the defendant company harboured him by keeping him after we gave them notice that he was there in breach of his agreement with us, and that an action will lie: *Quinn* v. *Leathem* (2), confirming *Lumley* v. *Gye*. (3) In *De Francesco* v. *Barnum* (1) Fry J. extends the principle to the case of an employer learning afterwards that the servant was under obligation to some one else, although he did not know it at the time when he induced him to enter his service.

H. Mather, for the defendant Weaver, relied on the alleged failure of the plaintiffs to perform their part of the agreement.

Tomlin, K.C., and *J. Rutherford*, for the defendant company. It is not enough that two of the directors of the defendant company may have known of this agreement. The plaintiffs must show (*a*) that the defendant company knew of the agreement; (*b*) that they acted maliciously within *Lumley* v. *Gye* (3), that is, that there was a deliberate setting out by the defendant company to do a thing which they knew ought not to be done—that they induced Weaver to leave in circumstances which they knew would be a deliberate breach of contract; and (*c*) damage, although not necessarily special damage.

There is no authority for saying that a man who bona fide employs a servant is liable in damages if he finds out a few weeks after the servant enters his employment that the servant is still under a contract of service with some one else under, for instance, a three years agreement. It is clear on the evidence in this case that there was no inducing or procuring Weaver to leave the plaintiffs' service; on the contrary, the defendant company told Weaver that he must be free from his contract with the plaintiffs before the defendant company could employ him. The plaintiffs have not paid Weaver his commissions, and the defendant company have treated Weaver's conduct as a repudiation of the agreement.

(1) 63 L. T. 514. (2) [1901] A. C. 495, 510.
(3) (1853) 2 E. & B. 216.

Hughes, K.C., in reply. It is well established that where a man employs a servant who is in the employment of another, even if the employer does it without notice, then as soon as he knows of it, he will be liable in damages if he continues to keep the servant in his employ: *Blake* v. *Lanyon*. (1)

Cur. adv. vult.

Feb. 17. JOYCE J., after stating the facts and referring to the defence of the defendants and to the evidence at the trial, said that in his opinion it clearly was not the fact that any such refusal or neglect on the part of the plaintiff company as was alleged in the defence was the cause of Weaver's leaving the plaintiffs; and, further, that there was not in truth any such neglect, refusal, or default on the part of the plaintiffs as would entitle Weaver to repudiate his agreement with them or treat it as no longer binding upon him. His Lordship then continued as follows:

The theory of there having been any such default on the part of the plaintiff company as would entitle Weaver to repudiate his agreement—which he never did—was an afterthought, an invention due to the ingenuity of some one casting about to discover some defence for him to the action. So far as Weaver himself is concerned he has entirely failed to establish any defence.

At the trial the defendant company sought to support the allegations of their defence by evidence of something quite different, namely, that the defendant company declined to take Weaver into their service until definitely informed by him that his agreement with the plaintiff company had been cancelled by mutual consent,—to my mind a not very probable statement,—and that they bona fide believed his statement to be true, and so are lawfully excused from employing him, although they knew all about the agreement of September 9, 1910. I much doubt the truth of this story, and at all events the defendant company never made any inquiry of the plaintiffs. It is much more probable that all the defendant company did, if they did anything, was to decline to agree to take Weaver unless or until

(1) 6 T. R. 221.

JOYCE J. 1915 FRED. WILKINS AND BROTHERS, LIMITED v. WEAVER.

he had left or definitely determined to leave the plaintiff company. But even about this I find some difficulty. The offer the defendant company made by their letter of August 27, 1912, was not subject to any condition in reference to the cancelling of his agreement with the plaintiffs or to his having determined to leave their service. Moreover, within a day or two after November 25, 1912, when Weaver left the plaintiffs, I think upon the next day, Wilkins, their managing director, upon the telephone complained to Rae, the managing director of the defendant company, telling him that Weaver had left the plaintiffs' employment without their consent. In cross-examination Rae said "When Weaver called and saw me at the end of August he definitely stated that he had agreed with Wilkins, or that they had mutually agreed, on a cancellation of his agreement. I am afraid I did not concern myself as to what he was entitled to do. That is a matter that did not touch me. As long as they had cancelled it or as long as he could honestly tell me that they had mutually agreed at cancellation that was as far as I went."

Then on December 18, 1912, the plaintiffs' solicitors wrote a letter to the defendant company in which, after referring to the plaintiffs' agreement with Weaver, they say "The agreement you will remember was arranged by Mr. Rae and the contents of it are therefore familiar to him. Weaver left our clients' employment without their consent and Mr. Wilkins instructs us that he informed Mr. Rae of this by telephonic communication in November last, but in any case we now give you formal notice of the fact that Weaver has improperly left his employment with our clients and we must call upon you to cease employing him." The only reply to that was a letter of December 19, 1912, from Mr. Rae to the plaintiffs' solicitors acknowledging the receipt of their letter of the previous day and saying that they had forwarded the same to their solicitors, from whom the plaintiffs' solicitors would doubtless hear. Notwithstanding the protests of the plaintiffs the defendant company, knowing all about the terms of Weaver's agreement with the plaintiffs, continued to employ Weaver. No doubt, he was a valuable servant, and his departure from the plaintiffs in the midst of various works for

which they had contracted must have been detrimental to their business and productive of loss and damage to them. I think that the defendant company for their own advantage—if indeed they had not also another motive, which is possible—desired to get him and succeeded in doing so.

Upon the authority of the cases cited to me by Mr. Hughes, and in particular *De Francesco* v. *Barnum* (1) and the cases therein relied upon, I must hold the conduct of the defendant company, in reference to the plaintiffs, at all events after November 26, 1912, if not before, to have been actionable by and productive of damage to the plaintiffs.

As to the liability of the defendant Weaver to damages there is of course no question unless I am entirely wrong in the view that I take of this case.

There must be a declaration that the defendant Weaver and the defendant company are liable to the plaintiffs for the damages occasioned to the plaintiffs by reason of the defendant Weaver leaving the plaintiffs' employment and being employed by the defendant company up to September 30, 1913, in breach of the agreement of September 9, 1910.

Solicitors: *Banks, Kendall & Taylor, Liverpool; R. McGowen & Son, Liverpool.*

NOTE.—In *De Francesco* v. *Barnum* 63 L. T. 514, Fry J. held on the authority of *Lumley* v. *Gye*, 2 E. & B. 216 (1.) that the action for receiving or continuing to employ the servant of another after notice does not depend on the Statute of Labourers, and therefore the repeal of that statute by the Statute Law Revision Act, 1863, made no difference: (2.) that the rule is not confined to cases of master and servant in the strict sense.

(1) 63 L. T. 514.

R. M.

JOYCE J.

1915

May 12, 13; *June* 11.

HALSEY *v.* WOLFE.

[1914 H. 2149.]

Money-lender—Transaction harsh and unconscionable—Excessive Interest—Interest on Interest—Payment by Instalments—Default Clause—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

The defendant, a registered money-lender, on four occasions advanced money to the plaintiff, a tradesman, upon what the defendant himself described as a fair average risk.

For the first advance of 100*l.* the plaintiff gave a promissory note for 150*l.* payable by fourteen equal monthly instalments, and after twelve of these had been duly paid the second advance of 50*l.* was made, upon the defendant's own invitation, and for this advance the plaintiff gave a bill for 65*l.* falling due three months after date. The rate of interest on the first advance was admittedly at least 72 per cent., and on the second advance 120 per cent. per annum. While the last-mentioned 65*l.* and 20*l.* of the first loan were still owing but not yet due, the defendant advanced the plaintiff 15*l.* in cash, making with the moneys so owing 100*l.*, for which the defendant gave a promissory note for 150*l.* (the extra 50*l.* representing interest) repayable by monthly instalments of 10*l.* 15*s.* After ten of these instalments had been duly paid the defendant advanced the plaintiff 150*l.* in cash and took his promissory note for 281*l.* 10*s.* repayable by instalments and made up of the 150*l.* advanced, 37*l.* 10*s.* being the money due on the last promissory note less a rebate of 5*l.*, and 94*l.*, presumably for interest.

All the promissory notes contained a proviso that upon default in payment of any instalment the whole of the money then remaining due on the note (i.e., including both capital and unaccrued interest) should immediately become payable. The effect of the third and fourth transactions involved the payment of interest upon interest charged in respect of the balance then outstanding of the earlier loans.

After six of the instalments had been paid under the last promissory note, the plaintiff commenced this action to reopen the transactions and for an account and consequential relief:—

Held that, in the circumstances, the charges made by the defendant were exorbitant and excessive; that the whole course of dealing with the plaintiff in respect of interest and otherwise was harsh and unconscionable within the meaning of the Money-lenders Act, 1900; that the plaintiff was entitled to relief; and that in taking the account interest at the rate of 15 per cent. per annum would be allowed.

WITNESS ACTION.

On March 9, 1912, the defendant, a registered money-lender, advanced to the plaintiff, a tradesman in a fairly good way of

business, the sum of 100*l.*, the plaintiff giving the defendant a promissory note for 150*l.* payable by monthly instalments of 10*l.* 15*s.* each with a proviso that in case default should be made in payment of any or either of such instalments the whole sum of 150*l.* or so much thereof as should then remain unpaid should become due and payable immediately. For the several instalments post-dated cheques upon the plaintiff's banking account were given by him from time to time, all of which were paid when presented. Twelve of these instalments of 10*l.* 15*s.* each, amounting in all to 129*l.*, were paid by the end of March, 1913.

Before making this advance, the defendant sent his agent to the locality in which the plaintiff carried on his business in order to make inquiries about the plaintiff's position, and the agent reported that it was "a good case." The defendant subsequently went there to see the plaintiff and satisfy himself in the matter.

On January 1, 1913, the defendant advanced the plaintiff a sum of 50*l.* as a loan for three months, taking from the plaintiff a bill for 65*l.* falling due at the beginning of April, 1913, and on April 1, 1913, while this 65*l.* and a balance of 20*l.* under the first promissory note both still remained due, the plaintiff gave the defendant a promissory note for 150*l.* made up, as to 100*l.* thereof, of (1.) 15*l.* in cash handed to the plaintiff, (2.) the balance of 20*l.* still remaining due on the first promissory note, and (3.) the 65*l.* on the bill of January 1, 1913; and as to the remaining 50*l.* thereof, of that further sum for interest. This 150*l.* was made payable by monthly instalments of 10*l.* 15*s.* each on the first day of each month, and the note contained a default clause similar to that in the first note.

Ten instalments, making in all 107*l.* 10*s.*, due under this note were duly paid up to and including that which fell due on February 1, 1914, leaving 42*l.* 10*s.* still to be paid by instalments. While this was still due, the defendant advanced the plaintiff 150*l.* in cash, taking a promissory note, dated February 11, 1914, for the sum of 281*l.* 10*s.* made up of (1.) the 150*l.* advanced, (2.) the sum of 37*l.* 10*s.* (being the 42*l.* 10*s.* remaining due on the promissory note of April 1, 1913, less a rebate of 5*l.*), and (3.) a further sum of 94*l.* in respect of interest. The 281*l.* 10*s.*

JOYCE J. 1915 HALSEY v. WOLFE.

was made repayable by monthly instalments of 20*l.* each, and this note also contained the default clause.

After six of the instalments under this last note had been paid, the plaintiff took legal advice, with the result that in September, 1914, this action was commenced for the reopening of the money-lending transactions, the taking of accounts, and relief from payment of any sum in excess of the sum adjudged by the Court to be fairly due from the plaintiff.

Tomlin, K.C., and *Harold Simmons*, for the plaintiff. The plaintiff's position was good, he had a substantial trade and machinery, and the fullest opportunity was given to the defendant's agent who made the inquiry. The defendant knew all this and that Halsey was a regular payer. Ten per cent. was a fair rate and all above that was excessive, and being excessive was harsh and unconscionable, and according to the authorities that is a sufficient ground for dealing with this case under the Money-lenders Act, 1900, s. 1: *Samuel* v. *Newbold* (1); *Harris* v. *Clarson* (2); *Levene* v. *Greenwood* (3); *Wells* v. *Joyce* (4); *Fieldings* v. *Pawson* (5); *Thomas* v. *Lord Ashbrook* (6); *Abrahams* v. *Dimmock*. (7)

Ward Coldridge, K.C., and *Patrick Hastings*, for the defendant. The Act has to be applied equably between lender and borrower. The plaintiff was a competent business man. The suggestion that this transaction was harsh and unconscionable is based upon the grounds of excessive interest and the default clause. The plaintiff was not in a position to give any security, and to lend money to him without security involved a serious and substantial risk. In the circumstances interest at 72 per cent. was not excessive or unreasonable. In *Samuel* v. *Burton* (8) there was a transaction similar to this and the Court of Appeal declined to say that 80 per cent. was excessive, and in *Carringtons* v. *Smith* (9) 75 per cent. was held not to be excessive. The Act

(1) [1906] A. C. 461.
(2) (1910) 27 Times L. R. 30.
(3) (1904) 20 Times L. R. 389.
(4) [1905] 2 I. R. 134.
(5) (1908) Collard's Money-lenders Acts, App. D, 228, 237.
(6) [1913] 2 I. R. 416.
(7) [1915] 1 K. B. 662.
(8) (1903) Collard's Money-lenders Acts, App. D, p. 366.
(9) [1906] 1 K. B. 79.

gives no indication what rate of interest is to be deemed excessive or what transactions are to be deemed harsh and unconscionable: *Part* v. *Bond.* (1)

The first, second, and third transactions were closed as a bargain between the plaintiff and defendant by the plaintiff's payment of 37*l.* 10*s.*, and a closed transaction of loan will not be opened: *Michaelson* v. *Nichols.* (2)

The default clause in the fourth transaction has not come into operation having regard to the date at which judgment is asked: *Fieldings* v. *Coventry.* (3) If judgment be given to-day, the plaintiff will have had a longer period for payment than otherwise he would have had. Therefore no argument that this transaction is harsh and unconscionable can be founded upon the insertion of a default clause.

Cur. adv. vult.

June 11. JOYCE J. The plaintiff is admittedly a respectable tradesman, an honest but obviously—I saw him in the witness-box—a very simple person, carrying on an established and fairly good business.

The defendant, who bears or uses the name of Wolfe, is a registered money-lender, and upon four occasions advanced money to the plaintiff, namely, (1.) on March 9, 1912, the sum of 100*l.*; (2.) on January 1, 1913, the sum of 50*l.*; (3.) on April 1 in the same year, 1913, the sum of nominally 100*l.*, of which 15*l.* only was paid in cash; and (4.) on February 11, 1914, the sum of 150*l.*

Upon the first occasion, after sending a representative to inquire, who reported the plaintiff as a "good case," and also himself going down to interview the plaintiff and inspect his surroundings, Wolfe advanced the plaintiff the sum of 100*l.*, requiring him to give a promissory note dated March 9, 1912, which, instead of being for the amount advanced with interest at a rate plainly stated, was, after the usual manner of money-lenders, made out for a larger sum than that borrowed—in this instance for 150*l.*, payable by monthly instalments of 10*l.* 15*s.*,

(1) (1905) 93 L. T. 49.
(2) (1910) 26 Times L. R. 327.
(3) (1907) Collard's Money-lenders Acts, App. D, 227.

JOYCE J. 1915 HALSEY v. WOLFE.

with a provision that in case default should be made in payment of any of the instalments the whole sum of 150*l.*, or so much thereof as then remained unpaid, should become due and payable immediately.

The effect and character of such a stipulation have been observed upon in various cases—in particular by Channell J. in *Levene* v. *Greenwood.* (1) To have made the principal sum advanced at once repayable in case of default might be allowable, but to make the whole 150*l.*—that is not merely the principal sum advanced but also interest to the amount of 50*l.*—payable and at once in case of default in payment of the first or any instalment was, in my opinion, unreasonable. It has been more than once judicially disapproved of. This provision was never particularly explained to the plaintiff, but he must be taken, I suppose, to have understood the words to which he affixed his signature, though he may not have realized or weighed their effect.

This method of procedure, that is to say, the device of making out the note for the aggregate amount of the principal advanced and the interest charged payable by instalments, also has this advantage from the point of view of the money-lender, that it makes it impossible for an ordinary person, let alone such a man as the present plaintiff, to say or calculate exactly what rate of interest is really being charged for the loan. In the present case the rival accountants called—one upon each side—differ considerably as to what was the rate of interest payable under this promissory note, as also in respect of subsequent transactions, having regard to the payment by instalments commencing at the end of the first month after the loan was made. Wolfe, however, admits that it was as much as 72 per cent., while the plaintiff's accountant alleges that it was considerably more.

For the several instalments post-dated cheques upon the plaintiff's banking account were from time to time given by him. All of these were duly and regularly paid when presented. He never made default. It was proved that the plaintiff could, if he

(1) 20 Times L. R. 389.

had gone to his bankers, have borrowed the money from them at 1 per cent. above the Bank rate, with a minimum of 5 per cent. Why he did not do this, instead of getting into the hands of such people as Wolfe, is incomprehensible, and was extreme folly as the result has shown.

Before the month of April, 1913, twelve of these instalments of 10*l.* 15*s.*, making altogether 129*l.*, had been paid. That is to say Wolfe had got back his 100*l.*, the sum advanced, with interest at more than 30 per cent., bearing in mind that the repayment had been by instalments commencing as far back as April 9, 1912. There was still, however, 20*l.* of the 150*l.*, the amount of the promissory note, remaining to be discharged by further instalments not yet fallen due.

As I have said, the instalments were regularly paid, and Wolfe, no doubt, being satisfied as to the risk or absence of risk, by letter of December 4, 1912, tempted the plaintiff to a further borrowing, and in fact shortly afterwards, namely, on January 1, 1913, Wolfe did advance to the plaintiff a sum of 50*l.* as a loan for three months. For this loan of 50*l.* for three months Wolfe obtained from the plaintiff a bill for 65*l.* falling due at the beginning of April, 1913. As to the rate of interest charged in the case of this particular loan there cannot be any dispute; 15*l.* upon 50*l.* for three months works out at 120 per cent. per annum.

At the end of March or beginning of April, 1913, Wolfe handed to the plaintiff the sum of 15*l.* in cash, requiring him to give a promissory note for 150*l.*, that is to say 100*l.* made up of the 15*l.* actually advanced, the 20*l.* still remaining to be paid but not yet due in respect of the first loan, and the aforesaid 65*l.* (being the principal of the loan of 50*l.* on the bill of January 1 with the interest thereon at 120 per cent.), a further sum of 50*l.* being added presumably in respect of interest. That is how the sum of 150*l.* appears to have been made up. And this 150*l.* is as before, that is like the original advance of 100*l.* in 1912, made payable by monthly instalments of 10*l.* 15*s.* on the first of each following month. Again there is the objectionable provision that in case of default in payment of any or either of such instalments the whole sum of 150*l.* or so

JOYCE J. 1915 HALSEY v. WOLFE.

much thereof as shall then remain unpaid shall become due and payable immediately.

When post-dated cheques were sent for the first four instalments the defendant in acknowledging receipt does not appear to be under any apprehension of losing his money. He thanks the plaintiff for past favours and adds the assurance at all times of his best services.

The instalments under the promissory note of April 1, 1913, were duly paid up to and including that which fell due on February 1, 1914, that is to say, ten instalments totalling 107*l.* 10*s.*, which would leave 42*l.* 10*s.* of the 150*l.* still to be paid by four monthly instalments not yet due.

Then on or about February 11, 1914, comes a transaction still more complicated than that of the previous April. This I am sure that the plaintiff never clearly understood. He could not be made to understand it when in the witness-box. He had always, as he said, been in a fog about it.

At this time according to the terms of the last promissory note there still remained to be paid the sum of 42*l.* 10*s.* by monthly instalments of 10*l.* 15*s.* falling due on March 1, 1914, and the following months. Wolfe then advanced the plaintiff 150*l.* in cash, taking a promissory note dated February 11, 1914, containing the objectionable default clause, for the sum of 281*l.* 10*s.*, an amount made up of the 150*l.* actually advanced with the sum of 37*l.* 10*s.* in respect of the promissory note of April 1, 1913 (being the aforesaid 42*l.* 10*s.* not yet due less what was called a rebate of 5*l.*), and there was added a further sum of, I think, 94*l.* In other words, the promissory note was for 94*l.* more than the aggregate amount of the sum advanced and the amount supposed to be outstanding upon the former transactions but in fact not then yet due. This promissory note is dated February 11, 1914, the 281*l.* 10*s.* being made repayable by instalments, and the note contained the objectionable default clause.

After six of the instalments of 20*l.* each under this last note had been paid, the attention of the plaintiff was called by some one who had been in the employment of Wolfe or his firm to the rates or rate of interest with which he had been and was being charged. This somewhat questionable person proposed for

the sum of 30*l.* himself, or by some one whom he styled his governor, to deal with Wolfe on the plaintiff's behalf, and as I understand he succeeded in extracting 10*l.* from the plaintiff. Ultimately, however, the plaintiff was regularly and properly advised by a solicitor, and in the month of September, 1914, this action was instituted.

Now, having regard to the arrangements for payment by instalments, and the manner in which the monthly instalments not yet due upon one loan were brought into account in making the next loan, it is difficult to calculate precisely what rate of interest was really charged upon the actual advances made upon the occasions of the three promissory notes being given. More than once interest was in effect charged upon interest not yet due in respect of a former loan which, as it seems to me, cannot possibly be justified. The rate of interest charged in respect of the advance under the promissory note of January, 1913, was clearly 120 per cent., and the balance of this, consisting partly of interest, and, in my opinion, excessive interest which ought never to have been charged, is brought into the later transactions.

From an early date, if not from the first at all events from the end of 1912, Wolfe knew or considered that he was practically certain to be paid, as indeed he was, to the extent of what might be legally due from the plaintiff, who was not nearly intelligent enough to realize or understand how he was being treated. In the witness-box Wolfe called the transaction a fair average risk, and he certainly was not afraid to trust the plaintiff, for he invited him to borrow more.

It is settled that the questions as to the rate of interest and whether the transactions are harsh and unconscionable are for the judge to decide, and, as one might expect, in dealing with cases under this Act different views have been taken by different judges, some of whom have not disguised their dislike for the Act.

I am bound, I think, to act upon my own opinion. I consider and am satisfied that in the circumstances of the present case the charges made by Wolfe were exorbitant and excessive, and that his whole course of dealing with the plaintiff as to interest,

JOYCE J. 1915 HALSEY v. WOLFE.

and in various other respects, was harsh and unconscionable in the sense in which that term is used in the Act. I must hold the plaintiff to be entitled to the usual relief in such cases.

The accounts must be taken upon the footing of a lower rate of interest. I doubt very much whether, in the circumstances, I ought to allow more than 10 per cent., but I will allow 15 per cent., 20 per cent. being, in my opinion, more than ample to cover this fair average risk. The account must be taken on that footing, and if in taking the account it appears that at any time the defendant had money of the plaintiff in his hands he must be charged with interest. I do not propose to direct the account to be taken in chambers. The account must be made out and brought before me when the matter is mentioned again.

Solicitors: *H. Davis; M. A. Jacobs.*

R. M.

SARGANT J. 1915 *July* 2.

JOHNSTON *v.* CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED.

[1915 J. 324.]

Company—Manager—Remuneration by a Percentage on Annual Net Profits—Prior Deduction of Income Tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 54.

By a clause in an agreement between a company and its manager he was to receive a fixed salary, and also, as soon as the profits for the year had been ascertained and certified by the company's auditors, a percentage of "the net profits (if any) of the company for the whole year." The agreement provided as follows: "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries" and other items, which did not include certain items which would be deducted before arriving at the net profits or the income tax payable by the company.

The balance-sheet for one year showed a certain amount of profits including the income tax payable by the company, and the auditors gave a special certificate that the percentage payable to the manager was calculated on the amount of profits less income tax:—

Held, (1.) on the principle laid down in *Attorney-General* v. *Ashton Gas Co.* [1904] 2 Ch. 621 (affirmed [1906] A. C. 10), that the income tax was part of the net profits available for dividends, and that the

manager was entitled to be paid his percentage on the net profits before deduction of the tax; and (2.) that, the certificate being based on a wrong principle, the Court was not bound by it.

By an agreement in writing, dated June 8, 1900, the Chestergate Hat Manufacturing Company, Limited, agreed with James Johnston to employ him as manager of its business and factory until determination of the employment by notice.

By clause 2 of the agreement Johnston was, after the first year of his employment, to receive a salary of 250*l.* per annum, and the clause proceeded as follows: "And in addition to such salary there shall be paid to the said James Johnston, at the end of the year 1900 and of every subsequent year of the continuance of this agreement, so soon as the profits for the year shall have been ascertained and certified by the auditors of the company, a sum equal to one third of the first 600*l.* of the net profits (if any) of the company for the whole of such year, and also a sum equal to a fourth of the second 600*l.* of such net profits (if any) and a further sum equal to one sixth of all such net profits (if any) over and above the sum of 1200*l.* in the year. For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries (including the said salary of the said James Johnston), rent, interest at the rate of 5 per cent. per annum upon capital, and after making such allowances for depreciation as the auditors of the company may advise."

Up to and including 1912, the company (by reason, as it said, that income tax was paid by another company) paid Johnston the above-named commission on the net sum available for dividends, after payment of salaries, rent, interest, and depreciation, but without first deducting anything for income tax. For the year ending 1913 the company made net profits which, before income tax was deducted, amounted to 3867*l.* 18*s.* 4*d.* The tax on this, 232*l.* 4*s.* 6*d.*, was deducted, and on the balance only, 3635*l.* 13*s.* 10*d.*, the company paid Johnston as commission 655*l.* 19*s.*, whereas he claimed 694*l.* 13*s.* 1*d.* The new auditors of the company had certified as follows: "We hereby certify that the net profit of the business . . . . for the twelve months to November 30, 1913, available for dividends for the purposes of

SARGANT J. 1915 JOHNSTON v. CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED.

clause 2 of the agreement . . . . dated June 8, 1900, ... amounted to the sum of 3250*l.* 0*s.* 9*d.* Acting on the instructions of the directors, the amount of directors' fees and tax thereon was to be added to the actual profit, as shown, and these, amounting to 385*l.* 13*s.* 1*d.*, make a total of 3635*l.* 13*s.* 10*d.*, upon which commission has been calculated upon the terms of the said agreement."

In the profit and loss account on the debit side the income tax was stated to be 232*l.* 4*s.* 6*d.*, and the "balance carried down" to be 3635*l.* 13*s.* 10*d.*

Johnston brought an action against the company claiming a declaration that upon the true construction of the agreement the company was not entitled, in arriving at the amount of commission payable to him, to deduct from the net profits mentioned in clause 2 of the agreement any income tax paid or payable by the company under the Income Tax Act, 1842; and payment of 38*l.* 14*s.* 1*d.*, the balance of commission due on that footing.

Martelli, K.C., and *Henry Johnston*, for the plaintiff. The net profits on which the plaintiff is entitled to his commission are the profits before the income tax payable by the company has been deducted. Under s. 54 of the Income Tax Act, 1842, the company's officer, on its behalf, has to prepare a statement of its profits, and the estimate is to be made on the amount of profits before any dividend is paid to a member, and each member is to allow out of such dividend a proportionate deduction in respect of the tax payable by the company. By s. 100, Sched. D, First Case, r. 1, the tax is to be computed on a three years' average of the company's profits. The plaintiff pays income tax directly, on the commission received by him under Sched. D, Second Case. The tax on the "net sum available for dividends" is collected at the source, and in effect the company is the official collector of the tax. The income tax is part of the profits, namely, such part as the Revenue is entitled to take thereout: *Attorney-General* v. *Ashton Gas Co.* (1) The net sum available for dividends consists of the profits available for dividend—that is to say, what remains after deducting what should be taken

(1) [1904] 2 Ch. 621, 624; affirmed [1906] A. C. 10.

away in order to arrive at the sum on which the tax is payable : *Fisher* v. *Black and White Publishing Co.* (1)

The certificate of the auditors is not the one contemplated by the agreement. It is a certificate ad hoc. The certified balance-sheet shows on the face of it that the deduction is wrong. As the certificate is based on an erroneous principle it is not binding on the Court.

Romer, K.C., and *J. W. M. Holmes*, for the company. The tax was properly deducted before arriving at the amount on which the percentage is payable. The word " net " is introduced to show clearly on what sum the percentage is to be calculated. The words that follow as to salaries, rent, interest, and depreciation are partly words of caution and partly words of limitation, but they are not exhaustive of the items which must be deducted before one arrives at the sum available for dividend. One obvious omission is that of rates. Another is income tax, for s. 54 of the Act requires that to be deducted before any dividend is paid. This case is different from *Attorney-General* v. *Ashton Gas Co.* (2), because here the question of what is payable hinges on something. Suppose the company had had two good years, and then a bad one. The tax would have to be calculated on an average of the three years, and might be so large as to wipe out any profit on the third year. In that case the plaintiff could not claim a percentage on what would have been divisible if the tax had not been deducted, for if a sum is exhausted by the tax it cannot be said to be available for dividend.

The auditors' certificate is conclusive and binding on the parties, and stands in the same position as an award : *Hodgkinson* v. *Fernie* (3) ; *British Westinghouse and Electric Manufacturing Co.* v. *Underground Electric Railways Co. of London.* (4)

No reply was called for.

SARGANT J. In this case the question between the parties is whether, on the true construction of an agreement for the employment of the plaintiff by the defendant company, the company is entitled, before arriving at the sum payable to

(1) [1901] 1 Ch. 174.
(2) [1904] 2 Ch. 621.
(3) (1857) 3 C. B. (N.S.) 189.
(4) [1912] A. C. 673, 686.

SARGANT J. 1915 JOHNSTON v. CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED.

the plaintiff under clause 2 of the agreement, to deduct from the net profits of the company any sum for income tax.

Under the agreement, which is dated in 1900, the plaintiff was to be employed by the company on the following terms: After the first year he was to receive a salary at the rate of 250*l.* per annum, and in addition to such salary he was to be paid at the end of the year 1900 and of every subsequent year "so soon as the profits for the year shall have been ascertained and certified by the auditors of the company a sum equal to" certain proportions of the net profits of the company, a larger proportion of the first part of the net profits and a smaller proportion of the further amounts as those net profits were larger, and then comes this important provision in the clause: "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries,"—including the salary of 250*l.* to the plaintiff Mr. Johnston—"rent, interest at the rate of 5 per cent. per annum upon capital, and after making such allowances for depreciation as the auditors of the company may advise." I accept the argument of Mr. Romer that those words of enumeration are not absolutely exhaustive, and that you are really not altering by means of them the meaning of the words "net profits" as defined in the words "shall be taken to mean the net sum available for dividends as certified by the auditors."

It appears that in the balance-sheet in question (in the profit and loss account) in certifying the balance carried to the revenue account—I think that is the exact phrase which denotes the sum which is carried to the revenue account for the purpose of ultimately arriving at the dividend—before that balance is ascertained income tax to the amount of 232*l.* odd has been deducted; and the question is whether that sum ought to be deducted before arriving at the "net profits" or "the net sum available for dividends" as stated in clause 2 of the agreement.

In my opinion, the matter is entirely covered by the judgments in the case of *Attorney-General* v. *Ashton Gas Co.* (1), and I do not think I can do better than take as the test the language of Buckley J., as he then was, as approved by the

(1) [1904] 2 Ch. 621.

Court of Appeal. He says this (1): "The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." That seems to me to entirely conclude this case. If I were to allow, as the company claims that I should allow, the income tax to be deducted before arriving at "the sum available for dividends" on which the amount payable to the plaintiff is to be calculated, I should be treating the income tax as an expense payable before the net profits were ascertained, instead of treating it, as I think I must do on the language of the Income Tax Act, and in accordance with the passage that I have cited from the judgment of Buckley J., as part of the net profits themselves.

I think that the matter would be absolutely clear except for the convenient but possibly anomalous practice which prevails, under which, as between a company and the Government, the net profits of the company are calculated on the average of the three preceding years, whereas as between the company and the shareholder the deduction is made on the amount which is actually paid to the shareholder. It is possible that in extreme and hard cases—such as one suggested by Mr. Romer—the actual profits earned in any year by a company may be less than the amount of income tax which the company would have to pay to the Government in respect of the average of the profits of the three preceding years; but I do not think that that really makes any difference. Under s. 54 of the Act it seems to me that strictly the shareholders are bound to have distributed amongst them, by way of burden, the amount which the company has actually paid as tax in the year in question; and, although it might be that the whole amount would be swallowed up in tax, I think that none the less it would be an amount available for dividend, although unfortunately, instead of going into the pockets of the shareholders, it would go entirely to the Government. Of course, what happens in practice, and what

(1) [1904] 2 Ch. 624.

SARGANT J. 1915 JOHNSTON v. CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED.

prevents the case of any hardship arising, and results in a convenient adjustment between the three parties, the Government, the company, and the shareholder, is this: that ultimately, as successive periods of three years are taken for the purpose of ascertaining the average profits, the shareholder may one year be charged rather too much, then in the next year he may be charged about the right amount, and then in the next year he may be charged rather too little: and ultimately over a sufficiently long series of years the matter adjusts itself. But, for the purpose of considering the strict way in which any such burden falls, it seems to me that I must consider that any sum which is paid by the company on behalf of the shareholders of that company by way of income tax, under the system under which income tax is deducted at the source, is part of the net profits of the company available for dividend.

A second and subsidiary point raised by the company in this entirely friendly action is whether the certificate given by the auditors makes any difference. In my opinion, if I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter. The object of such a certificate is to enable the auditors to deal with matters of account, and so on; and here on the face of the balance-sheet, and on the face of the certificate, looking at the two together, it seems to me quite clear that the auditors have proceeded upon a wrong principle. I do, in fact, doubt whether the auditors could give an ad hoc certificate at all, and whether for this purpose the parties are not limited to the ordinary balance-sheet as certified by the auditors, but I need not go into that. Even if the certificate, as an ad hoc certificate, is a proper certificate within the agreement, still, when it is obviously based, as I think it is, on a wrong principle, it does not oust my jurisdiction. It is not even as if this amounted to an arbitration. It is something entirely different, namely, an agreed machinery or method for arriving at a particular sum.

Accordingly I propose to make a declaration in the sense asked by the statement of claim and to give the parties liberty to apply. It does appear that the company have or may have been unduly favourable to the plaintiff in charging only 4 per

cent. on capital instead of 5 per cent. before arriving at the profits and in not deducting directors' fees before arriving at the profits; and, therefore, as the certificate is being opened on one matter I think it ought to be opened on all, and for that reason I merely make the declaration and give liberty to apply.

Solicitors for plaintiff: *Andrew, Wood, Purves & Sutton, for William Johnston & Co., Stockport.*

Solicitors for defendant company: *Ingle, Holmes, Sons & Pott.*

F. E.

In re LIND.

INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

C. A.
1915
June 18, 21, 22; *July* 9.

[1914 L. 1126.]

Mortgage—Expectant Share as One of Next of Kin of living Person—Assignment of, by Way of Mortgage—Definite Item of Property—Bankruptcy and Discharge of Mortgagor before Falling into Possession of Share—Effect on Mortgage.

In 1905 L., who as one of the next of kin of his mother was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In May, 1908, he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In August, 1908, he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A. proved in the bankruptcy. In 1911 L. assigned his expectant share to the I. Syndicate. In 1914 L.'s mother died, and the share thereupon fell into possession:—

Held by the Court of Appeal, affirming the decision of Warrington J., that, notwithstanding L.'s bankruptcy, the assignments of 1905 and 1908 remained in force and operated so as to transfer his share on the death of his mother and did not merely impose upon him a personal liability which could be affected by his bankruptcy.

Held, therefore, that the N. Society and A. were entitled in priority to the I. Syndicate.

Collyer v. *Isaacs* (1881) 19 Ch. D. 342 distinguished.

APPEAL from a decision of Warrington J. (1)

The action was brought by the plaintiffs, the Industrials Finance Syndicate, Limited, against George McClintock Lind,

(1) [1915] 1 Ch. 744.

C. A. 1915 LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

the Norwich Union Life Insurance Society, and Henry Lewis Arnold, claiming by their writ (inter alia) (1.) a declaration that the plaintiffs as assignees of Hugh James Lawrence Lind (hereinafter referred to as Hugh Lind), the lawful son and one of the next of kin of Florence Lind, deceased, were entitled by virtue of an indenture dated May 29, 1911, and made between Hugh Lind of the one part and the plaintiffs of the other part, and/or of an indenture of further assurance dated March 6, 1914, and made between the same parties, to one equal tenth part or share of and in the personal estate of the said deceased, subject as to one moiety of the said share which should remain after payment of the costs, charges, and expenses mentioned in the said indentures to the trust thereby declared in favour of the said Hugh Lind; (2.) that the defendant George McClintock Lind as administrator of the estate of the said deceased might be ordered to pay to the plaintiffs as such assignees as aforesaid the moneys representing the share of the said Hugh Lind in the said estate; and (3.), if and in so far as might be necessary, administration of the personal estate of the said deceased.

The parties subsequently concurred in stating a special case for the opinion of the Court, from which the following facts appeared.

On February 21, 1905, Florence Lind, a widow, was absolutely entitled to one third of the residuary personal estate of her late father, then represented by certain investments and cash set out in a schedule to a deed of that date. She was then of unsound mind, so found by inquisition, and had been continuously insane since the year 1895, and had not made any testamentary disposition of her property; and if she had then died her next of kin would be ten persons, of whom her son, Hugh Lind, would be one.

On February 21, 1905, Hugh Lind executed an indenture of mortgage for 800*l.* to the Norwich Union Life Insurance Society of this possibility, by the description of "All that and those the share or shares, rights, estate and interest whatsoever of or to which the mortgagor as next of kin of the said Florence Lind, or one of them, or otherwise howsoever is or will be or may at any time hereafter become possessed of or entitled to in any manner whatsoever expectant upon, or upon, the death of the said

Florence Lind of and in" her personal estate, whether specified in the schedule thereto or not, including her third share or other her share and interest in her father's residuary personal estate, together with power for the society in the name of the mortgagor, or otherwise to demand, sue for, recover, and give effectual receipts for the mortgaged premises, or any part thereof, and settle all accounts in respect thereof.

By an indenture dated May 20, 1908, and made between Hugh Lind (said to be thereinafter called the borrower, but in fact sometimes described as the vendor) of the one part and the defendant Henry Lewis Arnold (thereinafter called the purchaser) of the other part, in consideration of 450*l.* paid to him by the purchaser the borrower covenanted with the purchaser to pay him on the death of Florence Lind (but only if the vendor should be then living) 1500*l.* with interest and certain costs and other moneys, and the borrower, as beneficial owner, assigned to the purchaser in effect his expectant share in the personal estate of Florence Lind subject to the mortgage of February 21, 1905, and to a proviso for redemption on payment of 1500*l.* and interest and other moneys. By the same deed the borrower did "irrevocably appoint the purchaser his executors administrators and assigns and each of them his attorney and attorneys in his name or otherwise but at his expense to ask demand sue for or otherwise to sue for receive and recover from the committee or the personal representative of the said Florence Lind and from any other person or persons body or corporation in whose hands or under whose control the same might be the premises hereinbefore conveyed and on the receipt thereof or any part thereof to give proper receipts and discharges for the same and generally for all purposes hereinbefore mentioned or connected with these presents and with power to appoint a substitute or substitutes and the borrower hereby ratifies and confirms and agrees to ratify and confirm whatsoever his said attorney and attorneys or any substitute or substitutes acting under him or them shall do or purport to do by virtue of these presents."

On the same day the defendant Arnold signed and gave to Hugh Lind a letter giving him the right to repurchase what was there called the reversionary charge upon certain terms.

C. A. 1915 — LIND, *In re.* — INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

On August 15, 1908, Hugh Lind was adjudicated a bankrupt, and on October 12, 1910, he obtained his discharge. Neither the society nor Arnold proved in the bankruptcy.

By a deed dated May 29, 1911, Hugh Lind in consideration of 260*l.* as beneficial owner assigned to the plaintiffs in effect his expectant share in his mother's estate subject to a trust thereby declared as to a moiety thereof for Hugh Lind himself. On February 15, 1914, Florence Lind died intestate.

After the death of Florence Lind, by a deed dated March 6, 1914, and indorsed on the deed of May 29, 1911, Hugh Lind by way of further assurance assigned to the plaintiffs the share to which he was then actually entitled, and which had purported to be assigned by the therein within written indenture, and the trust of one moiety for himself was repeated.

On April 22, 1914, the defendant Arnold, purporting to act on the power of attorney contained in his mortgage, executed a similar assignment to himself of the share subject to the society's mortgage and to the proviso for redemption contained in his own mortgage.

Notices of the several deeds above mentioned were given to the defendant George McClintock Lind as administrator of Florence Lind, but nothing turned on the order in which they were given, and the details are therefore omitted.

The questions for the opinion of the Court were—(1.) whether the indenture of February 21, 1905, in the events which had happened, was a valid and effectual mortgage of the share and interest of Hugh Lind in his mother's estate; (2.) whether the indentures of May 20, 1908, and April 22, 1914, or either of them were valid and effectual (*a*) assignments or assignment, or (*b*) mortgages or charges or mortgage or charge of the same share and interest; and (3.) and (4.) as to the priorities of the various parties inter se.

The case was heard by Warrington J. for Joyce J. on February 16 and 17, 1915.

Warrington J. gave the following answers to the questions for the opinion of the Court (1):—

"I must answer the first question in the affirmative. In

(1) [1915] 1 Ch. 758, 759.

answer to the second question I propose to declare that the indenture of May 20, 1908, is a valid and effectual mortgage or charge of the share and interest of Hugh Lind as one of the next of kin of Florence Lind.

C. A. 1915 — LIND, *In re.* — INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

"In answer to questions 3 and 4 I propose to declare that the society and Arnold are both entitled to rank in priority to the plaintiffs. I understand it is unnecessary to determine the priorities as between the society and Arnold."

The plaintiffs appealed. The appeal was heard on June 18, 21 and 22, 1915. C. A.

Hughes, K.C., and *R. E. Moore*, for the plaintiffs. By the discharge in bankruptcy the debts due from Hugh Lind to the Norwich Union Life Insurance Society and to Arnold were released, and the securities went with them. By the assignment of an expectancy the assignee only gets a covenant, and not an interest in the property. The covenant is ancillary to the debt and goes with it: *Thompson* v. *Cohen* (1); *Cole* v. *Kernot*. (2) The assignees acquired no security on property, but only a personal right under the covenant. An order of discharge in bankruptcy releases the bankrupt from all debts (with certain exceptions) provable in bankruptcy: Bankruptcy Act, 1883, s. 30. All debts and liabilities, with certain exceptions, are provable in bankruptcy: s. 37, sub-s. 3; and by sub-s. 8 "liability" is defined in very wide terms. *Hardy* v. *Fothergill* (3) shows how wide a meaning is given to "liability." By s. 9, sub-s. 2, a receiving order shall not affect the power of a secured creditor to realize or deal with his security; and s. 168 defines "secured creditor" as "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." There was here no mortgage, charge, or lien on the property of the debtor. There was a mere contract with regard to an expectancy. It was not "property" of the bankrupt, as defined in s. 168, which passed to his trustee under s. 44. The assignment of non-existing

(1) (1872) L. R. 7 Q. B. 527. (2) (1872) L. R. 7 Q. B. 534, n.
(3) (1888) 13 App. Cas. 351.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

property was a mere covenant to assign the property if and when it came into existence. An assignment of future property only amounts to a contract to assign, from which the bankrupt is released by the order of discharge: *Collyer* v. *Isaacs.* (1) It is a mere liability which is released by the discharge. A covenant in a marriage settlement to settle after-acquired property is not released by the discharge in bankruptcy: *In re Reis.* (2) This point was not raised in the appeal to the House of Lords. (3) Such a covenant is incapable of being fairly estimated, and the Court may well say, under s. 37, sub-s. 6, that it is to be deemed to be a debt not provable in bankruptcy. *Lyde* v. *Mynn* (4) is not of assistance because the Bankruptcy Act applicable to that case only made debts provable in bankruptcy. In *Holroyd* v. *Marshall* (5) Lord Westbury L.C. said that a contract to sell or mortgage property of which the vendor or mortgagor is not possessed would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired, if the contract was one of that class of which a Court of Equity would decree specific performance; and Lord Chelmsford said that the moment the property comes into existence the agreement operates upon it. In *Tailby* v. *Official Receiver* (6) Lord Watson and Lord Macnaghten said the same. But until the property comes into existence the contract remains only a contract, from which the contractor is released by his discharge in bankruptcy: *Collyer* v. *Isaacs.* (1) Here the bankruptcy and discharge intervened before the bankrupt acquired the property and while the contract to assign remained only a contract. Specific performance of the contract would only have been decreed by way of security for the debt, and as the debt was released by the discharge in bankruptcy specific performance would not have been granted. The decision in *In re Clarke* (7), which was approved by the House of Lords in *Tailby* v. *Official Receiver* (6), turned upon the

(1) 19 Ch. D. 342.
(2) [1904] 2 K. B. 769.
(3) Sub nom. *Clough* v. *Samuel* [1905] A. C. 442.
(4) (1833) 1 My. & K. 683.
(5) (1862) 10 H. L. C. 191, 211, 220.
(6) (1888) 13 App. Cas. 523, 533, 542, 546.
(7) (1887) 35 Ch. D. 109; 36 Ch. D. 348.

question whether the assignment was too vague and general, and therefore has no bearing upon the present question. If the bankruptcy of the contractor had not intervened the assignments to the Norwich Union and to Arnold as security for the debts due to them would have been complete assignments upon the property coming into existence, but before that date the bankruptcy and discharge of the contractor had intervened, with the result that the debt due from him to each of them was released, and the covenant is gone with it. The judgment is therefore wrong. [*Ex parte Llynvi Coal and Iron Co.* (1) and *Pearce* v. *Bastable's Trustee* (2) were also referred to.]

Ward Coldridge, *K.C.*, and *F. Luxmoore*, for the defendant Arnold. The deed of May 20, 1908, passed to Arnold an equitable interest in the property assigned, and the equitable interest came into existence on the execution of the deed: *Holroyd* v. *Marshall* (3); *Tailby* v. *Official Receiver*. (4) In *Thompson* v. *Cohen* (5), as Blackburn J. pointed out, there was no covenant to transfer, or anything amounting to an equitable mortgage; there was a simple licence to seize after-acquired goods. A discharge in bankruptcy releases the personal obligation, but does not affect the equitable interest. Whether Arnold is a purchaser or a mortgagee, his equitable interest still exists. By the deed of 1908 Lind did all he could to vest the property in the defendant Arnold. *Tailby* v. *Official Receiver* (4) shows that an assignment of this nature passes the equitable interest in the subject-matter of the assignment. A bill of sale cannot now be open to the same objection as that in *Collyer* v. *Isaacs* (6), because under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), the bill of sale must contain a schedule with the articles comprised in it specified. If the rights of Arnold under the assignment rested upon contract, it was a contract of which there could not be a breach, and as there was nothing for which Arnold could prove, the liability of Lind under it was not released by his discharge in bankruptcy. Arnold's right under the contract was specific performance, and

(1) (1871) L. R. 7 Ch. 28.
(2) [1901] 2 Ch. 122.
(3) 10 H. L. C. 191.
(4) 13 App. Cas. 523.
(5) L. R. 7 Q. B. 527, 533.
(6) 19 Ch. D. 342.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

that right was not affected by the bankruptcy. An immediate interest was transferred by the assignment, and that interest was not affected by the bankruptcy: *Holroyd* v. *Marshall* (1); *In re Clarke* (2); *Meek* v. *Kettlewell* (3); *Abbott* v. *Stratten.* (4) The judgment of Jessel M.R. in *Collyer* v. *Isaacs* (5) does not mean that where there is a good equitable assignment there is only a personal remedy against the assignor. The decision in that case was that by that particular contract an equitable interest was not created in the property which was afterwards acquired. That is consistent with *Cole* v. *Kernot* (6), *Holroyd* v. *Marshall* (1), and *Reeve* v. *Whitmore.* (7) In *Brown* v. *Bateman* (8) Montague Smith J. pointed out that in *Reeve* v. *Whitmore* (7) there was a mere power to enter and seize; but in *Holroyd* v. *Marshall* (1) there was an absolute conveyance. Under the deed of May 20, 1908, Arnold took an immediate present right which attached instantly to the property when it fell in under the intestacy. *Collyer* v. *Isaacs* (5) was commented upon and distinguished in *Robinson* v. *Ommanney.* (9) In that case Kay J. pointed out that a covenant for further assurance in an ordinary mortgage would not be released by the discharge in bankruptcy of the mortgagor. (10) *In re Clarke* (2) shows that if, where there is an equitable assignment, the property falls in during or after the bankruptcy the right of the assignee attaches to the property. An assignment of definite property to be afterwards acquired creates an actual interest in the assignee from the date of the assignment whether the consideration be marriage, as in *In re Reis* (11), or other valuable consideration. The decision in *Thompson* v. *Cohen* (12) is in accordance with that in *Reeve* v. *Whitmore.* (7) In *Belding* v. *Read* (13) Pollock C.B. laid down the proposition that "there cannot be a prophetic conveyance," and that exposition of the law was standing at the date of *Collyer* v. *Isaacs.* (5) *Belding* v. *Read* (13) was subsequently

(1) 10 H. L. C. 191.
(2) 36 Ch. D. 348.
(3) (1843) 1 Ph. 342.
(4) (1846) 3 J. & Lat. 603.
(5) 19 Ch. D. 342.
(6) L. R. 7 Q. B. 534, n.
(7) (1863) 33 L. J. (Ch.) 63.
(8) (1867) L. R. 2 C. P. 272.
(9) (1882) 21 Ch. D. 780; (1883) 23 Ch. D. 285.
(10) 21 Ch. D. 785.
(11) [1904] 2 K. B. 769.
(12) L. R. 7 Q. B. 527.
(13) (1865) 3 H. & C. 955.

overruled in *Tailby* v. *Official Receiver*. (1) In the present case the property was bound immediately the deed of 1908 was executed.

Tomlin, K.C., and *Attwater*, for the defendants the Norwich Union Life Insurance Society. A contract may be regarded in a Court of Equity from two points of view. It may be entirely executory, i.e., where neither party has performed his part, or it may be executed in the sense that one party has performed his part. In the first case the remedy of the parties in equity is specific performance. But in the second case, if the consideration has been paid, the party making the payment has a greater right than specific performance and the property is treated as having passed to him. The party who has received the money is a trustee for the party making the payment. The fact that the property is non-existent at the time the payment is made makes no difference. If A. contracts for money paid to make over to B. the interest to which A. may be entitled as next of kin of C., A. ceases to have any interest in the property from the moment the consideration is executed. Whether or not B. has a contractual right which sounds in damages as a personal liability he has something more, namely, a right of property. There is nothing in *Collyer* v. *Isaacs* (2) which prevents the Court from applying the equitable view to the present case. In *Collyer* v. *Isaacs* (2) the Court treated the particular document as being in the nature of a personal agreement operating in a different way from an assignment. They treated it as creating a personal obligation undertaken by the contractor and completely differing from an assignment which equity would recognize. The reason for the view the Court took is to be found in the fact that the assignor was a tool maker and the particular assignment would have covered all his tools and would have prevented him from carrying on his business. In *Holroyd* v. *Marshall* (3) the assignment only included machinery and did not touch the stock in trade of the assignor. In *Collyer* v. *Isaacs* (2) unascertained chattels not sufficiently definite for specific performance were being dealt with. In the present case there is an assignment of a definite share,

(1) 13 App. Cas. 523. (2) 19 Ch. D. 342.
(3) 10 H. L. C. 191.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND.

although the particular chattels were not ascertained at the date of the assignment, and there is nothing to prevent the Court from taking the conventional, natural, and ordinary view of the assignment. [*Cole* v. *Kernot* (1) and *Thompson* v. *Cohen* (2) were also referred to.]

F. Whinney, for the defendant G. M. Lind, the administrator of Florence Lind, took no part in the argument.

Hughes, K.C., in reply. The question is whether the deeds of 1905 and 1908 created merely a personal liability which was released under the Bankruptcy Act, 1883, s. 30 and s. 37, sub-ss. 3 and 8, by the discharge in bankruptcy of the assignor. It does not follow that because a contract is the subject of specific performance a liability under it is not provable in bankruptcy. The defendants had no security on the debtor's property, and on his discharge his debts were released. It is true that a covenant to assign non-existent property will take effect against that property when the property comes into existence, and the covenant could be enforced against the trustee in bankruptcy while the bankruptcy is pending and there has been no discharge, but until that which is assigned becomes the property of the debtor there is nothing but a contract creating a liability provable in the bankruptcy, and if the debtor obtains his discharge the liability is released. It is quite clear from *Collyer* v. *Isaacs* (3) and *Thompson* v. *Cohen* (2) that whether an assignment is in the form of a covenant to assign or an actual assignment it is nothing more than a covenant to assign. The generality in the assignment in *Collyer* v. *Isaacs* (3) was not the ground of the decision in that case which is directly in point. The debtor in the present case had no prospective interest in the property of the intestate at the date of the assignment. It was a mere expectancy or hope until the death of the intestate. The judgment of Lord Macnaghten in *Tailby* v. *Official Receiver* (4) shows that the assignee of an expectancy takes no interest in the property, but that there is "a contract binding on the conscience of the assignor." He meant that until the property comes into existence there is a mere contract binding

(1) L. R. 7 Q. B. 534, n.
(2) L. R. 7 Q. B. 527.
(3) 19 Ch. D. 342.
(4) 13 App. Cas. 523.

on the conscience of the assignor. There is no equitable charge until the property comes into existence. It is impossible to have an interest in property which does not exist and may never exist. If Lord Macnaghten had been of opinion that there was an assignment of an equitable interest the words "binding on the conscience of the assignor" in his judgment in *Tailby* v. *Official Receiver* (1) would have been unnecessary. A title is only conferred on the assignee from the moment the property comes into existence. Until that time there is merely a contract, and the discharge in bankruptcy releases the debtor from his liability under it. "Liability" within s. 37, sub-s. 8, of the Bankruptcy Act, 1883, is an expression of the widest possible kind, and there is a right of proof unless the Court has declared under sub-s. 6 that it is not capable of being fairly estimated. In the present case there is in substance a covenant to assign property as security for an advance. The debt is provable. If the creditor does not prove for the debt it is released by the discharge in bankruptcy. If the debt is released the security of the covenant cannot remain, as the covenant is ancillary to the debt. There cannot be a security for a non-existent debt. The defendants were not secured creditors within the meaning of the Bankruptcy Act, 1883. [*Deering* v. *Bank of Ireland* (2) and *Finlay* v. *Chirney* (3) were also referred to.]

Cur. adv. vult.

July 9. The following written judgments were delivered :—

SWINFEN EADY L.J. This is an appeal from the judgment of Warrington J. upon a special case, in which the facts are fully set forth. It will be sufficient to state that on February 21, 1905, Florence Lind, widow, was absolutely entitled to one third of the residuary personal estate of her late father, then represented by certain investments and cash set out in a schedule to a deed of that date; that Florence Lind was then of unsound mind, so found by inquisition, and had been continuously insane since the year 1895, and had not made any testamentary disposition of her property; and that if she were then to die her next of kin would

(1) 13 App. Cas. 523. (2) (1886) 12 App. Cas. 20.
(3) (1888) 20 Q. B. D. 494.

C. A. 1915 — LIND, *In re.* — INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Swinfen Eady L.J.

be ten persons, of whom her son, Hugh Lind, would be one. Hugh Lind had thus a reasonable expectation of becoming entitled to a share of his mother's personal estate upon her death intestate. He had not any estate or interest, present or future, vested or contingent, in his mother's property; he had only a spes successionis, a possibility of becoming possessed in the future of a share of his mother's personal estate.

On February 21, 1905, he executed a mortgage for 800*l.* to the Norwich Union Life Insurance Society of this possibility, by the description of "All that and those the share or shares, rights, estate and interest whatsoever of or to which the mortgagor as next of kin of the said Florence Lind, or one of them, or otherwise howsoever is or will be or may at any time hereafter become possessed of or entitled to in any manner whatsoever expectant upon, or upon, the death of the said Florence Lind of and in" her personal estate, whether specified in the schedule thereto or not, including her third share or other her share and interest in her father's residuary personal estate, together with power for the society in the name of the mortgagor or otherwise to demand, sue for, recover, and give effectual receipts for the mortgaged premises, or any part thereof, and settle all accounts in respect thereof.

On May 20, 1908, Hugh Lind executed a second mortgage upon the same premises in favour of H. L. Arnold to secure 1500*l.*, and the security is expressed to be subject to the prior mortgage of February 21, 1905.

On August 15, 1908, Hugh Lind was adjudicated a bankrupt, and on October 12, 1910, obtained his discharge. Neither the Norwich Union nor Arnold proved in the bankruptcy.

By a deed dated May 29, 1911, Hugh Lind, in consideration of 260*l.*, as beneficial owner, assigned his expectancy to the plaintiffs, subject to a trust thereby declared as to one moiety thereof in favour of himself.

On February 15, 1914, Florence Lind died intestate.

By a deed dated March 6, 1914, and indorsed on the deed of May 29, 1914, Hugh Lind, by way of further assurance, assigned to the plaintiffs the share to which he was then actually entitled, and which had purported to be assigned by the therein

within written indenture, and the trust of one moiety for himself was repeated.

The plaintiffs contend that the securities of the Norwich Union and Arnold are of no value, and that the plaintiffs are now absolutely entitled to the share under their deeds of 1911 and 1914, free from any incumbrance. They base this claim upon the bankruptcy of Hugh Lind and his discharge while Florence Lind was still living. They say that the rights of the Norwich Union and Arnold rested only in contract, and amounted only to contracts to assure in the future, and by way of security for their mortgage debts; that by reason of the bankruptcy the bankrupt has been released from the mortgage debts; that the contracts to assure his expectant interest gave rise only to a right of proof which was not exercised; that any covenant for further assurance was only ancillary to and for the purpose of securing the mortgage debts, and that as the debts are discharged by the bankruptcy and discharge of the debtor, the covenant for further assurance is no longer in force.

No question has been raised that any assignee took without notice of prior dealings, nor that any priority has been gained by any notice given after the death to Florence Lind's legal personal representative. These considerations do not arise in the present case.

Is the contention well founded that the rights of mortgagees of an expectancy rest only in contract, giving rise to a right of proof if the assignor shall become bankrupt before the expectancy vests in interest, but otherwise barred by the bankruptcy, and discharge of the bankrupt? In my opinion the answer must be in the negative; the security of the mortgagee remains in force, and becomes effective whenever the expectancy vests in interest. In *Metcalfe* v. *Archbishop of York* (1) an incumbent duly charged his then present benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would fully charge the same with the annuity, and that in the meantime the same should be charged and chargeable with the annuity. In 1811, when this transaction was entered into, it was lawful for an incumbent to charge his

(1) (1836) 1 My. & Cr. 547, 557.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Swinfen Eady L.J.

benefice; but no legal charge on the new benefice was executed until 1818, by which time it had become unlawful, as the Act 13 Eliz. c. 20, prohibiting the charges on benefices, had then been revived. The Lord Chancellor (Lord Cottenham), affirming the Vice-Chancellor of England (Sir Lancelot Shadwell), held that the deed of 1811 constituted a good equitable charge which attached upon the new benefice as soon as it was acquired. He said it was contended that the covenant "amounted only to a covenant for a legal charge, which had become illegal before any attempt was made to enforce it. I am clearly of opinion, however, that this is not the true construction of the deed of 1811, and that there is an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants, that all equitable charges rest upon specific performance, and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds, to ask for a legal mortgage?" It will be observed that in that case the incumbent had no interest whatever in the new benefice at the date when he gave the equitable charge upon it, and yet so soon as the new benefice was acquired it was held that the equitable charge attached, without any further document having been executed. The case shows that an agreement to charge future property creates an immediate equitable charge upon the property coming into existence, independently of the contract to execute some further charge, and cannot be said to rest in contract only.

In *Holroyd* v. *Marshall* (1) it was held by the House of Lords that an assignment by way of mortgage of machinery to be acquired in the future gave a good title to such machinery from the moment when it was acquired, and without any novus actus interveniens. Lord Westbury L.C. there said (2): "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel

(1) 10 H. L. C. 191. (2) 10 H. L. C. 211

him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained." In the same case Lord Chelmsford considered the nature of the equity created by agreements to transfer or to charge future acquired property, whether it is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, and decided in favour of the latter view. He added (1): "At law property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it."

In *Tailby* v. *Official Receiver* (2) Lord Macnaghten stated that *Holroyd* v. *Marshall* (3) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* (3) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done. Lord Macnaghten then dealt with Lord Westbury L.C.'s reference

(1) 10 H. L. C. 220. (2) 13 App. Cas. 523.
(3) 10 H. L. C. 191.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Swinfen Eady L.J.

in *Holroyd* v. *Marshall* (1) to the subject of specific performance, and proceeded to point out that considerations applicable to suits for specific performance ought not to be transferred to cases of equitable assignment where nothing remained to be done in order to define the rights of the parties. He added (2): "The truth is that cases of equitable assignment or specific lien, when the consideration has passed, depend on the real meaning of the agreement between the parties . . . . When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created." See also *Lyde* v. *Mynn* (3), *In re Clarke* (4), approved in the House of Lords as "unquestionably correct" (5), and *In re Reis.* (6) It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for.

It was urged by the appellants that having regard to the wide language of s. 37 of the Bankruptcy Act, 1883, with regard to debts and liabilities provable in bankruptcy, all liability of the assignor of every kind, under the mortgages of 1905 and 1908, was provable; and that as the debts created by the mortgage deeds were extinguished by the bankruptcy, the contract relating to the future property, which was merely ancillary to and for the purpose of securing the debt, was also discharged. The answer is that the mortgagees under the deeds of 1905 and 1908 elected to rely upon their security, and not to prove, and therefore as mortgagees they stand outside the bankruptcy; and, moreover,

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 547.
(3) 1 My. & K. 683.
(4) 35 Ch. D. 109; 36 Ch. D. 348.
(5) 13 App. Cas. 550.
(6) [1904] 2 K. B. 769.

that any contract contained in those deeds for vesting the future property in the mortgagees was ancillary not to the debt, but to the mortgage by which the debt was secured, in like manner as the covenant not to revoke a will which had appointed a sum of money to a mortgagee was so held in *Robinson* v. *Ommanney* (1) both by Kay J. and the Court of Appeal. In the same case it was also decided that such a covenant is not released by the bankruptcy of the covenantor, where (as here) there was no breach before the bankruptcy. Kay J. instanced the case (2) of an ordinary mortgage with the usual covenant for further assurance, where it could not be said that, because the covenantor became bankrupt and was discharged from personal liability for the debt, the consideration was merely gone, and the covenant for further assurance no longer enforceable.

The appellants relied especially upon the cases of *Thompson* v. *Cohen* (3), *Cole* v. *Kernot* (4), and *Collyer* v. *Isaacs* (5) in support of their contention that a contract for the assignment of future property, however absolute in form, only amounts to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy, and from which he is released by the order of discharge. It must be remembered that before any of these cases was decided there was a well-established distinction in the case of instruments dealing with future chattels, between an assignment of them and a mere licence to seize, between the creation of an interest and a mere licence to take possession; and this distinction carried with it important legal consequences. *Carr* v. *Allatt* (6) and *Brown* v. *Bateman* (7) are instances of the former, where the title of the assignee prevailed, the rule being that wherever there is a clear indication of intention to pass an interest the Court will so construe the instrument as to give effect to that intention. *Reeve* v. *Whitmore* (8) is an instance of the latter (a licence to seize). Lord Westbury L.C. said (9): "The difference, therefore, is very clear and distinct with regard

(1) 21 Ch. D. 780; 23 Ch. D. 285.
(2) 21 Ch. D. 785.
(3) L. R. 7 Q. B. 527.
(4) Ibid. 534, n.
(5) 19 Ch. D. 342.
(6) (1858) 27 L. J. (Ex.) 385.
(7) L. R. 2 C. P. 272.
(8) 33 L. J. (Ch.) 63.
(9) 33 L. J. (Ch.) 66.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Swinfen Eady L.J.

to the operation of the deed: it is the difference between a present contract that the mortgagee should have a right and an interest attaching immediately by force of the contract upon all that property which, in futuro, might be brought on the premises, and a contract that the mortgagee should have a power of entering upon the premises for the purpose of seizing and taking possession of that future property. The contract that he should have a power to seize appears to me to be perfectly distinct from a contract that he should have a present and immediate right which would attach instanter upon the property brought upon the premises without the act of seizure. I think he has no such thing. I think the true extent and operation of the deed was merely this, that he had passing to him by virtue of the contract, a right and a security on and an interest in, all the then existing property, and the security is accompanied by a power enabling him at any time to enter upon the premises, and take the future property that might be found there. But a power is a very different thing from an interest; and if the extent and limit of the contract be merely that he should have such a power, then an interest would not arise under the power till the power was exercised, subject, however, to the observations which I shall hereafter make, with reference to the exercise of that right."

In this state of the law *Thompson* v. *Cohen* (1) arose for decision. It was held that the bill of sale in that case merely amounted to a licence to seize, Blackburn J. saying (2) that there was nothing "amounting to an equitable mortgage like the case of *Holroyd* v. *Marshall.* (3) Here is a simple licence to seize after-acquired goods for the purpose of selling them and discharging the debt, and the debt being gone, we think the collateral licence to seize goes with the principal debt." *Cole* v. *Kernot* (4) was dealt with by Mellor J. (1) on the same footing; he said that the Court were all satisfied that the two cases were identical in principle. Therefore whatever the actual language of the instrument in *Cole* v. *Kernot* (4) the Court must have construed it as amounting only to a licence to seize. *Collyer* v. *Isaacs* (5) may be explained in

(1) L. R. 7 Q. B. 527, 533.
(2) Ibid. 533.
(3) 10 H. L. C. 191.
(4) L. R. 7 Q. B. 534, n.
(5) 19 Ch. D. 342, 354.

the same way. The bill of sale in question was given by a trader, at one time an engineer and tool maker, and subsequently a billiard-slate manufacturer, and it embraced all chattels then on the premises, or which at any time thereafter might be brought thereon, in addition or in substitution. Unless, therefore, the bill of sale were construed as a floating security, not extending to future chattels until seized, the debtor could not carry on his business. There was also an express power in the deed for the mortgagee to enter and take possession of the said goods and chattels, and this probably explains why Jessel M.R. referred to the deed as being "in form" an assignment, and Lush L.J. added: "but which in fact amounted to a contract that he would appropriate any chattels which he might bring upon the premises to an already existing security." The document was construed as a licence to seize, but not as an actual assignment of future chattels. Having regard, however, to s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, the distinction between an assignment of future chattels and a licence to seize has become of less importance than formerly.

I am of opinion that the judgment of Warrington J. was right, and that the Norwich Union and Arnold are both entitled to rank in priority to the plaintiffs, and that this appeal should be dismissed.

PHILLIMORE L.J. I need not restate the facts. We have to determine whether the assurances made by H. J. L. Lind by way of mortgage of his expectancy of a share in the personal estate of his mother operated so directly upon the property that after the mother's death the assignees could take it notwithstanding the intervening bankruptcy and discharge of H. J. L. Lind.

Assignments of property not then in existence pass, as such, nothing.

"A man cannot in equity, any more than at law, assign what has no existence." See per Jessel M.R. in *Collyer* v. *Isaacs*. (1) The assignment does, however, operate as a contract to assign if and when the property comes into existence, and to use the

(1) 19 Ch. D. 351.

C. A. 1915 — LIND, *In re.* — INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Phillimore L.J.

words of the same great judge, "when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

This is intelligible and workable if nothing happen between the date of the assignment (construed as a contract to assign) and the date when the property comes into existence; but if in the intervening period something happen which may affect the contract, as, for instance, a statutory discharge of the assignor from all his obligations, does the contract to assign still become in due course a complete assignment?

If the assurance rest in contract and if by consequence the only way in which equity fastens upon the property be by the operation of the doctrine of specific performance, then the liability under the contract would be, as it seems to me, discharged by bankruptcy.

This being an assurance by way of mortgage would not come within the class of cases excepted by s. 37, sub-s. 6, of the Bankruptcy Act, 1883, nor within the special classes of cases referred to by the Earl of Selborne in *Hardy* v. *Fothergill* (1), nor I think within the decision of the Court of Appeal upon a covenant to settle after-acquired property in *In re Reis.* (2)

That these later covenants may be exceptionally preserved is shown by the language of Jessel M.R. in *Collyer* v. *Isaacs.* (3)

In order that the assignment may survive and have its effect it must give to the assignee something more than a mere right in contract, something in the nature of an estate or interest.

The real question in this case is whether the assurances by H. J. L. Lind remained in contract, or whether upon the property coming into existence they automatically, and without any novus actus interveniens, passed his estate or interest in his share of his mother's personal estate to the assignees.

That the assurances remain in contract might be inferred from some language of Lord Westbury L.C. in *Holroyd* v. *Marshall* (4) which I venture to quote:

"But if a vendor or mortgagor agrees to sell or mortgage

(1) 13 App. Cas. 351, 360.
(2) [1904] 2 K. B. 769.
(3) 19 Ch. D. 342, 354.
(4) 10 H. L. C. 191, 211.

property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

These expressions, taken perhaps without sufficient regard to their context, have led to misapprehension in several cases (as pointed out by Lord Macnaghten in *Tailby* v. *Official Receiver*. (1)) *In re Clarke* (2) might have been added to his list, and in this connection the language used in *In re Reis* (3) even after Lord Macnaghten's judgment must not be forgotten.

If the right has to be enforced by a suit for specific performance of a contract, involving as it does "some of the nicest distinctions and most difficult questions that come before the Court" (see per Lord Macnaghten (4)), then the right is in contract only and the statutory discharge in bankruptcy should operate, as Blackburn J. observed in *Thompson* v. *Cohen* (5), and I think that we must take it that it was upon this ground that the Court of Appeal decided the case of *Collyer* v. *Isaacs* (6), to which I shall refer later on.

But notwithstanding these allusions to the doctrine of specific performance of contracts, it is I think well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates

(1) 13 App. Cas. 523, 544.
(2) 35 Ch. D. 109; 36 Ch. D. 348.
(3) [1904] 2 K. B. 769,
(4) 13 App. Cas. 547.
(5) L. R. 7 Q. B. 527, 533.
(6) 19 Ch. D. 342.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Phillimore L.J.

an equitable charge which arises immediately upon the property coming into existence. Either then no further act of assurance from the assignor is required, or if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it not by reason of a covenant for further assurance the persistence of which through bankruptcy it is unnecessary to discuss, but because it is due from him as trustee for his assignee.

Among the many cases which determine this, I select the following: *Metcalfe* v. *Archbishop of York.*(1) The facts in that case were as follows. In 1803, the Act 43 Geo. 3, c. 84, repealed the Act 13 Eliz. c. 20, which prohibited the charging of benefices. In 1817 the Act 43 Geo. 3, c. 84, was repealed, and the effect of this repeal was to revive the Act of Elizabeth. In 1811 an incumbent charged his then present benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would fully charge the same with the annuity; and that, in the meantime, it should be charged and chargeable with the annuity. In 1814 the incumbent was presented to another benefice, but no legal charge was executed upon it until the year 1818, when such charges had become again prohibited; yet it was held by the Vice-Chancellor and the Lord Chancellor that the deed of 1811 constituted a good equitable charge which attached upon the new benefice as soon as it was acquired.

In that case Lord Cottenham L.C. said (2): "Suppose the deed of 1811 had not contained any covenant to execute a legal charge upon any newly acquired benefice, but merely a proviso and agreement that any such newly acquired benefice should be charged and chargeable with, and liable to the payment of the said annuity, could it be doubted that upon Mr. Warrington becoming vicar of Leake in 1814, that benefice became equitably chargeable with the annuity? If so, can the covenant to make a legal charge destroy the equitable charge? Can the covenant for further and better assurance, destroy the assurance actually executed? On the part of the defendants the appellants, this was hardly questioned; but it was contended that the covenant was all one, and that it amounted only to a covenant for a legal

(1) 1 My. & Cr. 547. (2) 1 My. & Cr. at p. 556.

charge, which had become illegal before any attempt was made to enforce it. I am clearly of opinion, however, that this is not the true construction of the deed of 1811, and that there is an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants, that all equitable charges rest upon specific performance, and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds, to ask for a legal mortgage? I am, for this reason, of opinion, that the Vice-Chancellor's judgment was correct in giving effect to this equitable charge, upon the vicarage of Leake, to secure the annuity."

In *Holroyd* v. *Marshall* (1) the judgment of Lord Chelmsford, and the judgment of Lord Westbury L.C., if taken in its entirety, are to the same effect; and this finally is the decision in *Tailby* v. *Official Receiver.* (2)

As against this current of decisions we have to deal with three cases on bills of sale in which attempts to bind future household furniture and effects were frustrated. The two cases in the Queen's Bench, *Thompson* v. *Cohen* (3) and *Cole* v. *Kernot* (4), may be explained as decisions upon the construction of the particular bills of sale, it being inferred from the terms of the documents that the mortgagor made no assurance of future chattels, but merely gave a licence to seize as ancillary to the security for the debt; though that was not the view taken of them by Baggallay L.J. in *Collyer* v. *Isaacs.* (5) But this last case cannot, in my opinion, be so explained. The reasoning by which the Court arrived at its judgment is thus stated by Jessel M.R. (6): "Until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability. That being so, when the party who contracts becomes bankrupt the liability in respect of that contract is a liability provable in the bankruptcy, but by the 49th section he is released,

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523.
(3) L. R. 7 Q. B. 527.
(4) L. R. 7 Q. B. 534, n.
(5) 19 Ch. D. 342.
(6) Ibid. 351.

C. A. 1915 LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. Phillimore L.J.

with certain exceptions, from every liability provable, and so, upon obtaining his discharge, the bankrupt will say, 'I am discharged from the liability; it was only a liability to which I was subject at the time of bankruptcy, and from that the discharge I have obtained releases me.'" The very fact that the Master of the Rolls reserves his opinion as to the effect of one special form of assurance of after-acquired property, namely, a covenant in a marriage settlement, lends weight and point to his previous language. The actual decision may be supported as Warrington J. thought it might (and as possibly the decisions in the Queen's Bench also might) on the ground that the security given by the bill of sale was like a debenture in the nature of a floating security. But this was not the process by which the Court of Appeal arrived at its conclusion. And I am bound to say that I think that the Court of Appeal in *Collyer* v. *Isaacs* (1) took the more logical view.

I do not understand an assignment which at the time only operates as a contract, but when the property comes into possession operates without more as an actual assurance; and even if this were intelligible I do not understand why in its chrysalis state it is not subject to the laws of a chrysalis, why, being still only a contract, it is not discharged by a discharge of contracts.

And I may add that I think it would be better as matter of public policy that all assignments of bare futurities were made impossible. But the law is settled in the other sense by the highest authority, and therefore Warrington J. was right, and this appeal should be dismissed.

BANKES L.J. The question for decision in this appeal is whether the discharge in bankruptcy of Hugh James Lawrence Lind put an end to all obligations and rights created by the indentures dated respectively February 21, 1905, and May 20, 1908, and made between Hugh Lind of the one part and the Norwich Union Life Insurance Society and H. Lewis Arnold of the other part respectively.

The material facts are as follows. In 1908 Hugh Lind borrowed money from the Norwich Union Life Insurance Society,

(1) 19 Ch. D. 342.

and as security he entered into the deed dated February 21, 1905, whereby he covenanted to repay the sum advanced and also assigned to the society, subject to a power of redemption, inter alia all the share or shares, rights, estate or interest of which he might become possessed of or entitled to as next of kin of his mother. In the year 1908 Hugh Lind borrowed money from Arnold, and as security he entered into the deed dated May 20, 1908, whereby he covenanted to pay Arnold a given sum of money on the death of his mother, and assigned to him the same interests as next of kin which he had already assigned to the Norwich Union, subject to the mortgage to that society. This deed contained a provision for reconveyance in the event of all moneys payable under its provisions being duly paid. In August, 1908, Hugh Lind was adjudicated bankrupt. In October, 1910, he obtained his discharge. In February, 1914, his mother died, and he therefore, as one of her next of kin, became entitled to a share in the property included in the assignments given by him. The only question in dispute is as to the effect of the discharge in bankruptcy upon the two assignments above referred to, and the answer to this question depends upon what is the exact nature and extent of the equitable interests created by those two deeds.

The assignments were assignments of a mere expectancy, and I do not think it is material to discuss the nature of the expectancy. There is this, however, to be said, that the fund of which the mother was entitled to a share is set out in detail in the schedules to the deeds, and the assignor's interest was apparently fairly safe, as his mother was a lunatic, so found, and she had made no will. In speaking of assignments of a similar kind to the present, Lord Herschell, in *Tailby* v. *Official Receiver* (1), said: "I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification

(1) 13 App. Cas. 523, 530.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED v. LIND. — Bankes L.J. —

when the subject has come into existence and it is sought to enforce the security." For the purpose of this judgment I propose to treat the assignments as if they were assignments of after-acquired property merely. It has long been settled that a Court of Equity will give effect to an assignment for good consideration of a mere expectancy though such an interest was not assignable at law. In *Grey* v. *Kentish* (1) Lord Hardwicke L.C. is reported to have said: "A husband cannot assign in law a possibility of the wife, nor a possibility of his own, but this Court will notwithstanding support such an assignment for valuable consideration . . . ." This passage is cited with approval by Lord Lyndhurst in *Meek* v. *Kettlewell.* (2) One way in which equity supports such an assignment is by treating the transaction, though in form an assignment, as containing or importing a covenant to do that which is necessary to effect the validity of the assignment. (See per Cozens-Hardy M.R. in *In re Mudge.* (3)) And one method by which a Court of Equity would compel the performance of such a covenant would, in a proper case, be by granting a decree for specific performance.

The argument for the appellants has been rested on two grounds: first, that the covenant to assign, which must be read into each assignment, was ancillary only to the debt covenanted to be paid, and that as the debt has been released by the discharge in bankruptcy, the security, if any, afforded by the covenant to assign has gone also; second, that the covenant to assign, being a mere personal obligation, was discharged by the discharge in bankruptcy.

The first question must depend upon the construction of the deeds themselves. I can find nothing in the language of the deeds to support this contention. On the contrary, if it be assumed that the deeds create some kind of security upon the debtor's interest as next of kin to his mother, it seems obvious that the security was intended to be in addition to that created by the personal covenant of the debtor to pay. If the appellants' argument is sound in the present case, I see no reason why it

(1) (1749) 1 Atk. 280. (2) 1 Ph. 342.
(3) [1914] 1 Ch. 115, 122.

should not be applied to every mortgage executed to secure repayment of a loan. This question was dealt with in argument as though it was in some way affected by the provisions of the Bankruptcy Act. I cannot agree with this suggestion. If the argument is sound, it must be because of the provisions of the deed creating the security, or not at all. The covenant in my opinion, as was stated to be the case in *Robinson* v. *Ommanney* (1), is ancillary to the security and not to the debt.

The second contention is the one on which the appellants mainly relied. In support of this contention it was urged that the policy of the Bankruptcy Acts is that when a bankrupt obtains his discharge he is completely freed from all his obligations and put into a position to make a fresh start. This is quite true as regards his personal obligations, but it is not true as regards his property. The policy of the Bankruptcy Acts with regard to burthens placed upon his property by the bankrupt is that the property shall at the option of the secured creditor remain subject to all burthens legitimately placed upon it prior to the bankruptcy. The interests in question in the present case were not property within the meaning of the Bankruptcy Acts at any time during the assignor's bankruptcy, but, assuming that they had been, Warrington J., in deciding as he did, did nothing in violation of the policy of the bankruptcy laws.

This, however, is not the real question in this appeal. The real question is as to the exact effect which equity gives to the assignments in question and as to the operation of the Bankruptcy Acts upon the covenant which equity imports into them. I will deal with this last point first. There is no decision precisely in point, but there is a body of judicial opinion upon the question. The covenant which has to be considered is a covenant to assign after-acquired property. The question which has to be determined is whether the existence of that covenant at the date of the bankruptcy created without more a mere liability within the meaning of s. 37, sub-s. 8, of the Bankruptcy Act, 1883, which must be deemed to be a debt provable in the bankruptcy. If it did, then the discharge in bankruptcy operated as a discharge from all liability under the covenant. If it did not, then the matter is

(1) 21 Ch. D. 780; 23 Ch. D. 285.

C. A. 1915 — LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. — Bankes L.J.

one outside the Bankruptcy Acts altogether, and the covenant is unaffected by the bankrupt's discharge. The authorities to which I will refer are *Robinson* v. *Ommanney* (1), where Kay J. (2), as he then was, expressed the opinion that a covenant for further assurance in a mortgage deed could be enforced in spite of the discharge in bankruptcy of the mortgagor. In *Hardy* v. *Fothergill* (3) the Earl of Selborne deals with this question in these words: "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc.; which on a fair interpretation of these words"—that is, the words of s. 31 of the Bankruptcy Act, 1869—"ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy." Cozens-Hardy L.J. in *In re Reis* (4) expresses no sort of doubt upon this latter question. He says: "When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy." Stirling L.J. says the same. (5) But for the difficulty occasioned by the case of *Collyer* v. *Isaacs* (6), to which I refer later, I should have had no hesitation in acting upon the opinion of the learned judges to which I have referred, and saying that the covenants to assign the after-acquired interests in his mother's property were not affected by the bankrupt's discharge in bankruptcy.

There remains the other question, as to whether these assignments do not in equity give the respondents an interest in the property itself. Upon this question there is again no decision precisely in point, if the question is regarded from the point of view of the effect of a discharge in bankruptcy, but there is in my opinion abundant authority which settles the question in principle. If the view of a Court of Equity on this point had been

(1) 21 Ch. D. 780; 23 Ch. D. 285.
(2) 21 Ch. D. 785.
(3) 13 App. Cas. 351, 360.
(4) [1904] 2 K. B. 769, 777.
(5) Ibid. 781.
(6) 19 Ch. D. 342.

that the only way in which to do equity in the case of an assignment of after-acquired property was to construe the assignment as a covenant to assign it, then in cases where the property came into existence something would have had to be done by the covenantor to give effect to his covenant; but I find that time after time it has been laid down, perhaps not always in the same words, that directly the property comes into existence the assignment fastens on it and without any actus interveniens the property is regarded in equity as the property of the assignee. In support of this statement of the law I would refer to *Metcalfe* v. *Archbishop of York* (1), *Smith* v. *Lucas* (2), *Pullan* v. *Koe* (3), and *Tailby* v. *Official Receiver*. (4) The language of Lords Watson and Macnaghten in the last mentioned case is very emphatic. Lord Watson says (5): "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee"; and Lord Macnaghten says (6): "Long before *Holroyd* v. *Marshall* (7) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust': *Legard* v. *Hodges*." (8) It appears to me to be manifest from these statements of the law that equity regarded an assignment for value

(1) 1 My. & Cr. 547.
(2) (1881) 18 Ch. D. 531, 543.
(3) [1913] 1 Ch. 9.
(4) 13 App. Cas. 523.
(5) 13 App. Cas. 533.
(6) Ibid. 546.
(7) 10 H. L. C. 191.
(8) (1792) 1 Ves. Jun. 477.

C. A. 1915 LIND, *In re.* INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND. Bankes L.J.

of future acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign. It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence. Warrington J. in the Court below put his view into these words (1): "In the present case I am of opinion that the mortgagees were at the time of the bankruptcy entitled not merely to the benefit of a personal obligation on the part of the mortgagor resulting in a claim for damages, but to a prospective interest in the distributive share in question taking effect automatically on the death of Florence Lind." For the reasons stated above, I think that there is a question whether the personal obligation on the part of the mortgagor in a case like the present results in a claim for damages, if by that is meant results only in a claim for damages, but I quite agree with the latter part of the learned judge's statement of the position of the mortgagees. The only difficulty in the case to my mind is created by the case of *Collyer* v. *Isaacs*. (2) This was a decision of the Court of Appeal, which is binding upon us, and unless the case is distinguishable from the present we should be bound to follow it. In that case the security given was a bill of sale. It contained an assignment of after-acquired property and a licence to seize the property in certain events, one of which was the bankruptcy of the grantor of the bill of sale. The grantor instituted proceedings in bankruptcy for the liquidation of his own affairs and he obtained his discharge in the liquidation. The grantee did not prove, but relied on his security. After his discharge the grantor recommenced business and acquired new plant for the purposes of this business. The grantee entered and seized this plant, and the grantor then moved the Court for an injunction to restrain the grantee from remaining in possession, or from removing or selling the plant. In the Court below the argument for the grantor was that the debt having been discharged, no property acquired after the debt

(1) [1915] 1 Ch. 758. (2) 19 Ch. D. 342.

ceased to exist could be made available to secure it. For the grantee it was contended that the assignment was a valid assignment in equity which entitled the grantee to take the course he did. Hall V.-C. decided in favour of the grantee, stating in his judgment that Courts of Equity have treated instruments dealing with non-existent property as being transfers of property as effectual for non-existing as they were for existing property. In the Court of Appeal the arguments for the appellant were the same as were advanced in the present case. In giving their judgments none of the learned judges refer to the question of whether the covenant did or did not give a right to specific performance, nor did they deal in terms with the question of whether an assignment of after-acquired property could in equity create an interest in the property when acquired, and they based their decision entirely upon the operation of the Bankruptcy Act upon the particular bill of sale before them.

Jessel M.R. (1) treats the case as one where there was a general liability in respect of a debt which was barred by a discharge in bankruptcy with a liability in respect of a covenant to secure that debt. So limited the decision is not an authority against the view taken by Warrington J. and which I think was right. There is one passage in the judgment of Jessel M.R. in which he says (2): "until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability." This passage has been referred to as if it was a statement that the only remedy on the contract sounded in damages. I do not so read the passage, nor do I think, if the passage could be so read, that it is in accordance with the authorities to which I have referred.

For the above reasons I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Nye, Moreton & Clowes; Hartcup & Davis; Hicks, Arnold & Mozley; Walker, Martineau & Co.*

(1) 19 Ch. D. 352. (2) 19 Ch. D. 351.

J. E. A.

JOYCE J.
1915
May 4, 5, 6, 7;
June 22.

H. BLACKLOCK & CO., LIMITED *v.* C. ARTHUR PEARSON, LIMITED.

[1914 H. 1071.]

Copyright — Compilation — Index of Stations to Railway Guide — Monthly Publication—Infringement—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 7, 35.

The plaintiffs were the proprietors of the monthly publication known as Bradshaw's Guide, being a compilation of the current time-tables of the various railways in the United Kingdom, and having an alphabetical index to all the stations, many thousands in number, that were mentioned, with references to the pages where the names would be found. In this action the plaintiffs sued only in respect of their copyright in the monthly numbers published in and subsequent to January, 1903.

In 1914 the defendants, for the purpose of a prize competition arranged in connection with their journal, *Pearson's Weekly*, required to have a printed list, which could be purchased by competitors and the public, of the names of all the railway stations in the United Kingdom. Having partially made up such a list from other sources, they completed it by copying from the index to the current number of Bradshaw's Guide the names of some hundreds of stations, most of which, however, appeared in the index to the numbers published prior to 1903. The defendants then printed this list and sold a large number of copies at a profit under the title of "List of Railway Stations for use in *Pearson's Weekly* Great Picture Contest," thereby, as the plaintiffs contended, infringing their copyright in the current number of Bradshaw's Guide. The defendants contended that in so far as it reproduced old matter the number of Bradshaw's Guide for January, 1914, was merely a new edition of the Guide for 1902, and that they had not copied any substantial part of the Guide for January, 1914:—

Held, that the index to the numbers of Bradshaw's Guide for 1914 was not a new edition, in the sense in which that phrase was used in copyright law, of the index to Bradshaw's Guide for 1902, but was an index to a new and different work in which the plaintiffs were entitled to copyright; that the defendants had infringed the copyright of the plaintiffs; and that the plaintiffs were entitled to recover damages.

WITNESS ACTION.

The plaintiffs were the publishers and owners of the copyright in "Bradshaw's General Railway and Steam Navigation Guide," commonly known as, and hereinafter called, Bradshaw, which was a monthly publication reproducing, in an altered and

classified form and with cross references, the substance of the time-tables for the ensuing month of every railway company in Great Britain and Ireland. Each monthly number of Bradshaw was prefaced by an index in the shape of an alphabetical list of the stations and other places mentioned in the body of the book with references to the pages where the same could be found.

The defendants were the proprietors and publishers of *Pearson's Weekly*, and in 1903 they carried on a competition for a prize offered by them to the reader who most correctly guessed the names of the railway stations represented by a series of pictures which were published in *Pearson's Weekly*. On the occasion of this competition, the plaintiffs, working on a joint arrangement with the defendants, issued in pamphlet form for the use of competitors, at a charge of 3*d.* each, a list of railway stations which was a mere reprint of the index to the then current number of Bradshaw, and was intituled "Index to Railway Stations reprinted from Bradshaw's Railway Guide of January, 1903." From the sale of these pamphlet lists the plaintiffs made a profit of 800*l.*, and the defendants a profit of 1200*l.*

In the issue of *Pearson's Weekly* for March 21, 1914, another competition of a similar nature was commenced by the defendants. Previous negotiations with the plaintiffs for the issue again of their Bradshaw list of names of railway stations for the purposes of this later competition having fallen through, the defendants themselves issued a pamphlet list of railway stations, which they called "List of Railway Stations for use in *Pearson's Weekly* Great Picture Contest," and advertised for sale, at the price of 3*d.* a copy, in one of the conditions relating to the competition. This list of railway stations bore a striking resemblance to the list in the index to Bradshaw.

The plaintiffs complained of the publication of this second list, alleging that it was an infringement of their copyright in the January, 1903, edition and in all subsequent editions of Bradshaw or in some or one of them, and they commenced these proceedings for an injunction to restrain the defendants from printing, publishing, or circulating the list in question containing any passages copied, taken, or colourably altered from Bradshaw;

JOYCE J. 1915 H. BLACKLOCK & CO., LIMITED v. C. ARTHUR PEARSON, LIMITED.

damages for infringement; proper accounts; delivery up of all copies of the list; and damages for breach of copyright.

From the evidence at the trial the following facts appeared. The railway time-tables reproduced by Bradshaw differed from month to month, the differences being more numerous at the commencement of the summer and winter seasons, and the compilation of the index to Bradshaw, although the making up of the list of the names of the stations was not entirely new every month, was a work of labour and expense, some few railways issuing no time-table at all and other railways issuing no index to their time-tables. In compiling their offending pamphlet list the defendants had first of all prepared a list of the names of railway stations from the "A.B.C. Railway Guide," to which list were afterwards added names taken from the time-tables of fifteen different railway companies, and then finally Bradshaw was searched and some 319 names were taken from that, most of which were in the index of Bradshaw for December, 1902, used for the previous competition.

P. O. Lawrence, K.C., Hughes, K.C., and *Hugh Beazley*, for the plaintiffs. Under s. 1, sub-s. 2, s. 2, sub-s. 1, s. 3, and s. 35, sub-s. 1, of the Copyright Act, 1911, the plaintiffs claim copyright in Bradshaw. They are only suing in respect of their copyright in the numbers of Bradshaw published in and subsequent to January, 1903, and they contend that there is copyright in the whole and every part of each number. The defendants have infringed the plaintiffs' copyright and made unfair use of it for the purposes of their own profit, and the plaintiffs are entitled to relief. One man cannot take a substantial part of another man's work and publish it for profit: *Weatherby & Sons* v. *International Horse Agency and Exchange* (1); *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association.* (2)

Tomlin, K.C., E. J. Macgillivray, and *J. O. Hickman*, for the defendants. The plaintiffs' publication is not the subject-matter of copyright at all. The reprinting of a bundle of time-tables, even with the addition of mileage and cross references, is not

(1) [1910] 2 Ch. 297. (2) (1889) 40 Ch. D. 425.

the subject-matter of copyright: *Leslie* v. *J. Young & Sons.* (1) Here the plaintiffs reproduced already printed matter, and that fact alone differentiates this from the cases relating to directories.

Further, assuming that Bradshaw may be the proper subject of copyright, the reproduction in a later edition of old matter which appeared in an earlier edition confers no new copyright in respect of that old matter. The new copyright only covers the new matter: per Lindley L.J. in *Thomas* v. *Turner.* (2) There have been monthly issues of Bradshaw since 1847, and the copyright in many of those must have expired. The plaintiffs have limited their claim to copyright to issues subsequent to December, 1902. Of the 900 names which the defendants did not take from the "A.B.C. Railway Guide" only some 300 were taken from Bradshaw, and of those only some forty or fifty are new since December, 1902. There have been about 1600 entirely new stations added to Bradshaw since December, 1902, making an average of ten additional new names in each of the subsequent issues. There is no copyright in the old matter reproduced month after month, and what is new is negligible. There can be no infringement under the Copyright Act, 1911, unless the whole or a substantial part of the work is reproduced. Fifty names do not constitute a substantial part of the index to Bradshaw. The quantity and value of what the defendants have taken are infinitesimal, and the nature and object for which they were taken are entirely different from those of the plaintiffs' publication: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (3); *Weatherby & Sons* v. *International Horse Agency and Exchange* (4); *Folsom* v. *Marsh* (5); *Chatterton* v. *Cave* (6); *Pike* v. *Nicholas* (7); *Kenrick & Co.* v. *Lawrence & Co.* (8); *Chilton* v. *Progress Printing and Publishing Co.* (9)

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

(1) [1894] A. C. 335.
(2) (1886) 33 Ch. D. 292, 298, 299.
(3) 40 Ch. D. 425.
(4) [1910] 2 Ch. 297.
(5) (1841) 2 Story, 100, 117.
(6) (1875) L. R. 10 C. P. 572; (1878) 3 App. Cas. 483.
(7) (1869) L. R. 5 Ch. 251.
(8) (1890) 25 Q. B. D. 99.
(9) [1895] 2 Ch. 29.

JOYCE J.
1915
H. BLACKLOCK & CO., LIMITED
v.
C. ARTHUR PEARSON, LIMITED.

June 22. JOYCE J. This is a rather curious action involving questions of copyright in reference to a portion of the monthly publication well known to us all as Bradshaw's Railway Guide, or more simply Bradshaw, of which the plaintiffs are the proprietors.

At, or shortly before, the beginning of every month Bradshaw reproduces, inter alia, but (speaking generally) in an altered form, the substance of the time-tables of every railway in Great Britain that are to be in force during the then or next current month, such tables being classified and furnished with cross references and some additional information. The time-tables for one month differ to a greater or less extent from those of the preceding month, and at two periods of the year, the commencement of the summer season and the winter season respectively, there are ordinarily many changes. In every number of this monthly publication there will be found next following the title-page an alphabetical list of the stations and other places mentioned and, of course, references to the page or pages where each place appears in the body of the book, thus furnishing the book with an index, which, however, is not merely an index, but something more. The compilation of this index, in particular the making up of the list of names of stations from the time-table, though it be not entirely new every month, would obviously be a work of labour and therefore of expense. I was told that to the time-tables issued by some of the railway companies there is no index, and for some few railways I think no time-tables are issued at all.

In the spring of 1914, the defendants, who publish *Pearson's Weekly*, in order to increase the number of its readers and purchasers, determined to open a competition, the first notification of which I think appears on page 991 of the number of this periodical for the week ending March 21, 1914. The list of railway stations there referred to, which practically every competitor would have to buy, was published by the defendants at the price of 3*d*. and is described on the title-page and elsewhere as copyright. This list contains many thousands of names; the greater the number of names the greater probably would be the difficulty of the competition, and for some reason or other it was,

or was considered by those who prepared it, necessary that this list should be as complete as possible, that is, should contain the names of all the railway stations in Great Britain and Ireland.

As a matter of fact in 1903 upon the occasion of a former similar competition the list of stations used in connection therewith was published by arrangement between the defendants and the plaintiffs and was a mere reprint of the index to the then current number of Bradshaw, being intituled "Index to Railway Stations reprinted from Bradshaw's Railway Guide of January, 1903." Upon the occasion of this later competition in 1914 there was some negotiation between the parties for a similar reprint or publication upon joint account, but they failed to come to terms, and the defendants determined, as they informed the plaintiffs, to publish the required list independently "on their own responsibility without entering into any arrangement with" the plaintiffs. And accordingly the defendants published and no doubt sold a large number of copies of the book I have mentioned, namely, "List of Railway Stations for use in *Pearson's Weekly* Great Picture Contest."

Under the present Copyright Act, copyright subsists in every original "literary work," which term includes compilations; so that I suppose the list of names which forms or is contained in the index to Bradshaw is entitled to copyright as much as any other part of the publication.

Now suppose that at any time in 1914 there was for any reason, or I thought that there was, a public demand for a complete list of railway stations in the United Kingdom and I thought it would be profitable to publish and offer for sale such a list, and suppose that without taking any trouble to collect the names and compile the list I merely copied the list of names from Bradshaw's index and sold printed copies to the public, I suppose that that undoubtedly would be an infringement of the copyright, if any, in Bradshaw. So if in the year 1914 the defendants had in connection with and for the purpose of their competition taken the index to the then current Bradshaw (though omitting the numerical references to the later pages of the work) and reprinted and published this (either gratuitously or at the price of 3*d.*), that would have been, I imagine, an

JOYCE J. 1915 H. BLACKLOCK & CO., LIMITED v. C. ARTHUR PEARSON, LIMITED.

infringement of the copyright in a material portion of the book of the plaintiffs, though to be used for a different purpose by those who purchased copies. The question whether this would have been so or not I put to—rather pressed upon—the counsel for the defendants. They would not argue to the contrary, and practically admitted that in the circumstances supposed there would, as I think there would, have been an infringement of the plaintiffs' copyright in Bradshaw.

If this be right, then, subject to a point to be more particularly dealt with presently, I suppose the result would be the same if the defendants without any independent investigation took and reprinted and published not the whole but only a substantial portion of the list of names forming the first column of the index to Bradshaw.

The modus operandi by which the defendants—of course not personally but by persons in their employ—compiled the "List of Railway Stations" in question in this case appears to have been as follows: First, a list was made under direction of Miss Hacker by extracting and copying all the names of the stations which appear in the "A.B.C. or Alphabetical Railway Guide" from and to London, familiarly known to us as the "A.B.C." time-table. This was typed and in the discussion before me was referred to as the typed list. Then it is said that to find more stations a Mr. Adams examined and searched the current time-tables of a number of railway companies and, finding a number of stations named that were not in the typed list, added these names in writing to that list. But ultimately for some reason or other, not perhaps difficult to conjecture, he turned to the index of the current Bradshaw and completed the "List of Railway Stations for use in *Pearson's Weekly* Great Picture Contest" by copying, without any reference or verification of any kind, such of the names he found in the index as he had not already got in the typed list as supplemented by his researches in such of the railway companies' time-tables as he says he examined. Then the list as thus completed was printed and published by the defendants at the price of 3*d.*, and of this they have sold copies at that price, no doubt realizing a handsome profit.

The result of the procedure I have just described, notwithstanding a good deal of curious fencing and, I think I may say, prevarication on the part of the defendants in the course of the proceedings in the action as to how the "List of Railway Stations" the defendants published was compiled, was, and indeed it was ultimately admitted, that the names of some hundreds of stations were merely taken from the index to Bradshaw in order to complete or perfect the list for publication. I think it highly probable that a good many more were so taken than was in fact admitted, although it was not positively so proved. But at all events it appears to me that the defendants took a substantial portion of the list of names contained in the index to the plaintiffs' publication, thus without any exertion of their own getting the benefit of the labour and expense expended in compiling the list which formed the index to Bradshaw. This they did not for their own personal use, but for the purpose of reproduction by publication at a profit. This "List of Railway Stations" the defendants published and sold, not indeed as an index to Bradshaw, but for another purpose of their own and of those who purchased copies, and, subject to a point I will presently mention, I come to the conclusion that what was done by the defendants was an infringement of the copyright of the plaintiffs.

Hitherto I have assumed existence of copyright in the index to the monthly number of Bradshaw from which Adams copied. Upon this, however, arises the point I have just referred to. The defendants, while not denying that there was copyright in the index to the numbers or a number of Bradshaw for 1902, assert, and it may be the fact, that such copyright (if any) had expired by the year 1914, and that the particular monthly number for 1914 from which Adams copied was merely a new edition of the numbers for 1902, and that as to such part of the index to Bradshaw in 1914 as was composed of names to be found also in the index to Bradshaw in 1902 there could not be any subsisting copyright. I think this argument fallacious. I think it would be wrong to treat the index to Bradshaw in 1914 as a new edition, in the sense in which that phrase is used in copyright law, of the index in 1902. I should

JOYCE J. 1915 H. BLACKLOCK & CO., LIMITED v. C. ARTHUR PEARSON, LIMITED.

say the same of the London Post Office Directory, the Blue Book, or Red Book, or any similar publication for 1914. It was in my opinion an index to a new and different work. The Bradshaw of the month, the number for which was copied from in 1914, purported to be and was a new book. It gave the tables for that month and that only, and they no doubt, if it be material, which it does not appear to me to be, were mostly if not entirely different from the tables in 1902. A book which consists of a specification of the conditions at the present moment of a constantly changing subject-matter is a new work even though some of the particulars given may not have altered from what they were, and were stated to be, at some prior date, perhaps years before. It was stated, I do not say proved, but not I think denied, that of the stations and places in the index to the Bradshaw of 1902 as many as 250 or thereabouts are not to be found in the index to the Bradshaw of 1914; that there are as many as 1600 more stations or places in the index to Bradshaw in 1914 than there were in 1902; and that of those as many as 600 are new stations. The result is, as I have said, that I think the defendants have infringed the plaintiffs' copyright.

There is no occasion for an injunction now that the competition is over, and I do not intend to direct an inquiry as to damages. Bearing in mind that the defendants' list in no way entered into competition with the plaintiffs' publication, I assess the damages at 50*l*. There will be judgment for the plaintiffs for that amount and the costs of the action.

Solicitors: *Baker & Nairne; Carter Harrison & Armstrong.*

R. M.

BODEGA COMPANY *v.* MARTIN.

[1914 B. 3841.]

C. A.
1915
ASTBURY J.
June 7, 8, 21.
C. A.
July 23.

Revenue — Licensed Premises — Increase of Duty — Apportionment — Lease — Liability of Grantor to pay Proportion of Increased Duty — "Grantor of lease" — Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46 — *Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where the licensed premises are held under a lease made before the passing of the Finance Act, 1910, which does not contain any covenant on the part of the lessee to obtain a supply of intoxicating liquor from the grantor of the lease, the lessee under such lease shall be entitled to recover as a debt due from the grantor of the lease a proportion of any increase of duty payable in respect of the licence under the provisions of the Finance Act, 1910.

The defendant, under an arrangement with certain co-adventurers who were interested in obtaining for the plaintiff company a lease of certain licensed premises, advanced moneys to enable the property to be purchased and took a conveyance of the property to himself in order to secure the repayment of his advances. In 1892, in pursuance of the arrangement, he granted a lease of the premises to the plaintiff company in consideration of a rent and premium, and without any tie or obligation on the part of the company to purchase intoxicants from him. The defendant's advances having shortly afterwards been paid off, he assigned the reversion on the lease to nominees of the co-adventurers, and so ceased to have any interest in the property. In an action by the company to recover from the defendant a proportion of the increased licence duty payable in respect of the premises under the Finance (1909-10) Act, 1910:—

Held, reversing the decision of Astbury J., that the defendant, being the person who had under his hand and seal created the term of years in the demised premises, was the "grantor of the lease" within the meaning of s. 2 of the Finance Act, 1912, and as such was liable to pay to the company the proportion of the increased licence duty.

Bodega Co. v. *Read* [1914] 2 Ch. 757 followed.

WITNESS ACTION.

In 1891 the Bedford Hotel, Bedford Street, Strand, was advertised for sale by public auction on May 25.

One Lavery, who was a director, if not the managing director, of the Bodega Company, desired to obtain a long lease of the ground floor and basement for his company.

For this purpose it was necessary to acquire the freehold in

C. A. 1915 — BODEGA COMPANY v. MARTIN.

the first instance, but it was important that the Bodega Company should not appear on the scene for fear of raising the price, and the arrangements were conducted by Lavery.

Lavery first asked Kirk, a builder, to co-operate in purchasing the property and to arrange the finance on the terms that Lavery and Kirk were to divide the profits of the transaction. Kirk was to do the rebuilding and grant the lease.

Kirk then approached Steel, a financial broker, and it was arranged by Lavery, Kirk, and Steel that Steel should buy the property and grant a lease of the ground floor and basement to the Bodega Company for ninety-nine years from September 29, 1891, at a rent of 900*l.* and a premium of 2000*l.* payable as to 1000*l.* on the execution of the lease and 1000*l.* a year later. The three co-adventurers were to divide the profits.

In pursuance of this arrangement Steel bought the property on May 25, 1891, for 11,000*l.* He gave a cheque for 1100*l.* deposit, but Kirk had in fact temporarily to provide funds to meet it.

Shortly after this Steel informed Martin, a financier, of the arrangements that had been made for the acquisition of the freehold and grant of the Bodega lease, and on the faith of these arrangements Martin agreed to find the purchase-money in consideration of 1000*l.* bonus and 6 per cent. on advances, stipulating, however, that the conveyance must be made direct to himself in order to secure repayment.

On May 29, 1891, Lavery told his board that he had secured an offer for a long lease of the ground floor and basement at 900*l.* a year rent and a 2000*l.* premium payable by instalments up to the date of possession; lessors to do the structural alterations, and plans for rebuilding to be prepared for the board's approval. The board resolved that Lavery be authorized to complete the negotiations.

On May 30, 1891, Steel wrote to Martin acknowledging the receipt of the 1100*l.* deposit money and lodging and transferring the contract of purchase as collateral security therefor; and further agreed in consideration of Martin advancing the balance of the purchase-money to pay Martin a bonus of 1000*l.* together with 6 per cent. interest and all expenses incurred until the

12,000*l.* (i.e., purchase-money and bonus) was repaid. The freehold was to be conveyed direct to Martin, and the 12,000*l.* repaid during the year 1891. The 2000*l.* premium payable by the Bodega Company on their lease was to go in part liquidation of the 12,000*l.* As soon as the 12,000*l.* was repaid Martin was to reassign the property to Steel or his nominee, and if it was not repaid by the end of 1891 Martin was at liberty to dispose of the property at a month's notice and recoup himself.

A formal agreement between Steel and Martin varying these terms was subsequently prepared and dated June 25, 1891. But the purchase was completed on that day, and this agreement was never in fact executed.

On June 15, 1891, Lavery saw the company's solicitors as to the proposed lease and explained that he might have to be a part purchaser of the premises in order to obtain the lease for the company. The solicitors pointed out that this might imperil his seat on the board unless his position was fully disclosed and authorized, and they wrote to the board to that effect.

On the same day Lavery wrote to the board informing them that he believed he could arrange a long lease at a rent of 900*l.* and a premium of 2000*l.* payable 1000*l.* on possession and 1000*l.* twelve months after, and asking if they would take the lease on those terms. Lavery also stated that he might have to be a part purchaser, and asked them if satisfied to pass a resolution stating that the position of matters had been disclosed and authorized.

The Court held that notwithstanding the date of this letter the arrangements had been really completed between Lavery and the Bodega Company long prior thereto.

On June 17, 1891, the board, having read Lavery's letter to the effect that in negotiating for the lease he would be obliged to become interested in the purchase of the freehold, resolved that the board having full knowledge of the facts and greatly appreciating Lavery's influence and financial assistance in acquiring the premises for the Bodega Company thereby authorized the acceptance of the terms mentioned in the letter.

On June 25, 1891, the property was conveyed to Martin absolutely at the request of Steel, who joined in the conveyance.

C. A. 1915 BODEGA COMPANY v. MARTIN.

By an agreement dated July 28, 1891, Martin agreed with Kirk to advance 4500*l.* for building expenses. Martin was to have a bonus of 500*l.* and 6 per cent. interest on advances. Kirk was to indemnify Martin in respect of his building obligations to the Bodega Company. Kirk was to have a nine months option of purchasing the freehold on payment of 18,200*l.* and 6 per cent. interest. This amount was an estimate based on the purchase-money, anticipated expenditure, and the bonuses.

On August 5, 1891, the company's seal was affixed to an agreement between themselves and Martin binding themselves to accept the lease when the building was completed, but this agreement was never in fact exchanged.

In due course the new building was completed, and on May 11, 1892, Martin granted a lease of the ground floor and basement to the Bodega Company for ninety-nine years from September 29, 1891, at a rent of 900*l.* and a premium of 2000*l.*, of which 1000*l.* was then paid and 1000*l.* was payable on May 11, 1893. The lease did not contain any tie or obligation on the part of the lessees to purchase intoxicating liquors from the lessor.

Kirk on behalf of Lavery, Steel, and himself subsequently found purchasers for the reversion, namely, Brymer's trustees. He arranged with them that they should buy the reversion and grant him a head lease for ninety-nine years from September 29, 1892, at 550*l.* rent. The purchase price was fixed at twenty-six and a half years' purchase, namely, 14,575*l.*

On December 5, 1892, Martin and Kirk as sub-purchaser conveyed the property subject to the Bodega lease to Brymer's trustees for 14,575*l.* paid to Martin, and on the same day Brymer's trustees granted Kirk a lease of the whole building for ninety-nine years from September 29, 1892, at 550*l.* rent subject to and with the benefit of the Bodega lease.

Kirk at the same time repaid Martin the balance of all moneys due to him beyond the 14,575*l.*, and Martin's connection with the property ceased.

The 1000*l.* balance of premium was subsequently paid to Kirk. Kirk also settled accounts with his co-adventurers Lavery

and Steel, retaining the head lease subject to 12,000*l.* mortgages as his share in the transaction.

On May 9, 1896, Kirk sold the head lease subject to the 12,000*l.* mortgages to Read for 750*l.*, so that Read became the Bodega Company's immediate landlord.

Prior to the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), the annual duty payable in respect of the licence was 51*l.*, but after that Act it became 278*l.* The increase of duty was therefore 227*l.*

Under the Finance Act, 1912, s. 2, the Bodega Company became entitled as lessees under the lease to recover as a debt due from or deduct from any sum due to "the grantor of such lease or agreement for lease" a share of the increase of duty "proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises."

They first sued Read, their immediate landlord, but Warrington J. and the Court of Appeal held that the section referred to the original grantor and not to an assignee: *Bodega Co.* v. *Read.* (1)

In the present action the Bodega Company claimed to recover a proportion of the increased duty from Martin.

Martin submitted that though on the face of the documents he was the legal grantor he was in fact a mere mortgagee of the co-adventurers who had agreed to grant the lease before he came on the scene, and his execution of the lease as their agent or trustee was merely part of the machinery for giving effect to the agreement subject to which he took his security, which in equity was a security on the reversion to the lease really granted by the co-adventurers, including possibly the Bodega Company itself.

Martin and Kirk gave evidence to this effect. Steel was dead, and Lavery was not called as a witness.

The only question was whether Martin was liable, and the quantum of liability was not discussed. It may, however, be useful to append the calculation of the Bodega Company's surveyors as a practical precedent.

(1) [1914] 2 Ch. 283, 757.

C. A.
1915
BODEGA COMPANY v. MARTIN.

Premium 2000*l.* decapitalized for 99 years at 5 per cent. . .	£101 per annum
Rent	900
Total	£1001
Rent of premises if unlicensed .	280
Rent in respect of licence .	£721

Increase of duty = £227.

Therefore grantor pays $\frac{721}{1001} \times$ £227 = £163 per annum from date of increase.

The action came on for hearing before Astbury J. on June 7, 1915.

Hon. Frank Russell, K.C., and *Harold Burrows*, for the Bodega Company. The increased duties were imposed by the Finance (1909-10) Act, 1910, s. 43. In the case of a tied house the lessees were entitled to relief against the tie owner under s. 46, but there was no relief in the case of a free house. This was remedied by the Finance Act, 1912, s. 2, which gives relief against the "grantor of the lease" in the case of leases made before the Act of 1910. It was thought that those words included the assignee of the reversion and the company accordingly sued Read. But in *Bodega Co.* v. *Read* (1) Warrington J. dismissed the action, and the Court of Appeal affirmed his decision. Warrington J. held (2) that the words meant "the person who actually puts his signature and seal to the lease," i.e., as grantor, and the Court of Appeal held (3) that Martin was the grantor.

[ASTBURY J. As far as they knew he was the beneficial owner. The present point was not before them.]

That may be so, but the expressions of opinion hardly point to any distinction between a legal and equitable grantor. The suggestion now is that Martin was only an agent or trustee for the beneficial owners, or only a mortgagee bound by their contract prior to his mortgage. That, if it be the fact, is absolutely immaterial. Whatever right of indemnity Martin may have

(1) [1914] 2 Ch. 283, 757. (2) [1914] 2 Ch. 290, 292.
(3) [1914] 2 Ch. 761.

against the beneficial owners, he was undoubtedly the grantor within the section.

Gordon Hewart, K.C., and *Roope Reeve*, for Martin. *Bodega Co.* v. *Read* (1) merely decided that an assignee of the reversion was not the grantor. The Courts no doubt spoke of Martin as the grantor. But they obviously thought he was the beneficial owner. We now know the actual facts. Martin was merely a temporary part of the machinery, namely, a mortgagee bound by his mortgagors' prior contract to grant the lease. In equity he was merely a mortgagee of the reversion. He could never have resisted a redemption action.

[ASTBURY J. Who were the real owners prior to the grant of the lease?]

The three co-adventurers Lavery, Kirk, and Steel, and if, as we ask the Court to infer, Lavery was really acting as agent for the Bodega Company, that company must also be treated as part owner. The real grantors were therefore Lavery, Kirk, and Steel, and possibly the Bodega Company itself. Martin was a mere financial machine and took no part in making any of the arrangements and no benefit in the increased rent or premium. He made the lease not as mortgagee on his own behalf, but as agent for the beneficial owners.

Suppose an attorney executes a lease in his own name under s. 46 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). Is he the grantor within the Finance Act, 1912, s. 2? Or suppose twenty years ago an executor had to execute a lease in fulfilment of his testator's contract. Surely he is not the grantor intended by the section to be made retrospectively liable for duty imposed twenty years after he had distributed the estate, a distribution which he was legally compellable to make in due course of administration.

The Legislature obviously intended to impose the duty on the beneficial grantor or estate, i.e., the beneficiary or estate which was originally entitled to the increased rent or premium, and not on the mere legal or ministerial hand. There is no actual decision on the point, but in the case of undeveloped land duty under the Finance (1909-10) Act, 1910, s. 19, it is the

(1) [1914] 2 Ch. 283, 757.

C. A. 1915

BODEGA COMPANY v. MARTIN.

equitable and not the legal owner who is liable: *Allen* v. *Inland Revenue Commissioners.* (1)

Hon. Frank Russell, K.C., in reply. *Allen* v. *Inland Revenue Commissioners* (1) turned on the special definition of "owner" in s. 41 as "the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold" and it was held that a purchaser in possession under a contract for sale was within the definition, though the estate was not to be conveyed till all the instalments of purchase-money were paid. There is no corresponding definition of grantor here and the case is of no assistance.

The only question here is who was the grantor. The question of beneficial ownership is absolutely irrelevant. There is no evidence that Lavery, who has not been called as a witness, was in any sense acting as agent for the Bodega Company, at all events in anything but negotiations for their lease. They could not possibly have been made liable for the purchase-money, and any suggestion that they were among the grantors falls to the ground.

It is then urged that Martin, who in fact granted the lease, was not the grantor within the section, and that Lavery, Kirk, and Steel, who were not even parties to it, were the real grantors. But look at the facts. Martin insisted on having the conveyance in his own name and granted the lease accordingly. He alone could have enforced the covenant or sued in ejectment. Even if he was really only a mortgagee, which we do not admit, he obtained the benefit of the increased rent as part of his security. He could have appointed a receiver or foreclosed.

It is, however, contended that he was only agent or trustee for the beneficial owners. But the true position is this. The man who executed the lease is the grantor from whom the lessees are entitled to recover their quota under the section. If he executed the lease as executor, trustee, mortgagee, or attorney in his own name he must look to his estate, cestui que trust, mortgagor, or principal for indemnity. But the right of the lessees is against their grantor, and questions of equitable ownership or right of indemnity do not concern them. The case is no doubt a hard

(1) [1914] 1 K. B. 327; [1914] 2 K. B. 327.

one and probably unforeseen by the Legislature. But the language of the section is exceptionally plain and it is for the Legislature and not for the Court to amend it.

Cur. adv. vult.

June 21. ASTBURY J. in a considered judgment dismissed the action. After stating the facts and his conclusions upon the evidence the learned judge considered the judgments of Warrington J. and the Court of Appeal in *Read's Case* (1), and continued:

These judgments plainly lay down that the words "grantor of the lease" in s. 2 of the Act of 1912 must be read in their strict sense as meaning the original grantor of the lease and do not include an assignee of the reversion for the time being in receipt of the rent of the demised premises.

I am not at liberty for the purpose of arriving at my decision to discuss or consider whether the statute, as so construed, is just or unjust, or whether it carries out the intention of the Legislature, or what that intention, apart from that which can be gathered from the words employed in the statute, may have been, but the decision in *Read's Case* (1) does not cover the point I have to decide, which is whether under the circumstances as now known the defendant Martin was the grantor of the lease within the meaning of the language used in the Act, guided as far as I can be by the above decision and the proper deductions to be drawn therefrom. It is impossible, however, at the outset to avoid appreciating the hardship and injustice that an adverse decision would entail on the present defendant. He merely financed the then equitable owners of the property, receiving as a consideration for so doing a sum of 1500*l.* and interest on his advances only, and obtaining in the events which have happened no benefit as grantor of the plaintiffs' lease from the rent and premium payable thereunder, and it is now sought to make him liable for a large annual sum, possibly for the remaining term, seventy years, of the lease, under a statute passed years after he ceased to have even a mortgagee's interest in the reversion.

(1) [1914] 2 Ch. 283, 757.

C. A. 1915 BODEGA COMPANY v. MARTIN. Astbury J.

The defendant Martin contends that the statute must be taken in this case to refer to the person or persons who he submits in truth and in fact granted the lease, that is, the equitable owners of the property who arranged for the granting of the lease before he came on the scene, and at whose direction and for whose benefit it is contended that he executed the document, not as mortgagee, but as agent. Two illustrations were offered of cases in which it was submitted that the man who puts his hand and seal to a lease would not be the grantor within the meaning of the Act: (1.) A lease executed by an attorney in his own name under s. 46 of the Conveyancing Act, 1881. In this case, however, the attorney would not purport to be or act as grantor. (2.) A lease granted by an executor and trustee of an insolvent testator who in his lifetime had entered into a contract to grant it. This I will advert to presently.

The Bodega Company, on the other hand, contend (1.) that the grantor referred to in the statute must be the man who, having sufficient estate in him to do so, in fact granted the lease. This is no doubt accurate as a general description of the expression, but is subject, as I will explain in a moment, to the particular intention of the document in which the expression occurs. (2.) That the licensed property in lease to the Bodega Company increased the value of Martin's security which, if the mortgagors had made default, would have remained in him. Martin no doubt stipulated or intended that his security should include the reversion, but he would have had to foreclose the mortgagors before any such change in the character of his holding occurred. (3.) That Martin was not willing that the property should be conveyed to Steel, and to allow him to grant the lease, which would have involved his waiting for his security until the property was rebuilt, although his advances were required in the meantime. This is no doubt the case. (4.) That Martin alone from the date of the lease until the sale to Brymer's trustees could have enforced the covenants of the lease and sued in ejectment. This is no doubt accurate from the fact that the legal estate was in him. (5.) And lastly, that if Martin granted the lease as agent or trustee for the true owners, he was none the less the grantor, as the legal estate in the property was in him,

though he may be entitled to be indemnified against his liability under the Act. Here again the question is whether Martin was in fact the grantor within the meaning of this particular statute.

I ought, I think, in the first place, in attempting to solve the riddle submitted to me, to form a conclusion how far the decision in *Read's Case* (1) assists me to proceed in the decision of this; and in the next place, if it is still open to me to do so, to decide how far I ought, if at all, to depart from the grammatical and ordinary sense of the words "grantor of the lease" as used in the Act of Parliament, if it is necessary in my judgment to do so.

Now *Read's Case* (1) has clearly laid down that as between the grantor and his assignee the receipt of rent for the time being under the lease is not the test of liability, the reasons which led the Court to so hold appearing in the judgments, but for the purpose of ascertaining who is the grantor liable under the Act on the footing that an assignee is not liable the Courts did not either decide or express any opinion. To say, however, that receipt of rent does not render an assignee liable to be sued as grantor within the meaning of the Act is a very different thing from saying that the non-receipt of rent or premium and the absence of any right to any such receipt beneficially are immaterial to the question who is the grantor referred to and intended by the statute.

A grantor in the ordinary case who by reason of his grant of a lease became beneficially entitled to the reversion might have made what terms as to profit and otherwise he liked on a sale and assignment of the reversion, and might after that assignment still remain a grantor within the meaning and intention of the Legislature when it set out to apportion the burden of the increased duty between the two parties benefiting by the licence, that is the grantor and the grantee. But to hold that a man who as agent or otherwise put his hand as grantor to a lease under circumstances in which the true owners of the property would receive the rent, and he himself would not, is liable to bear a portion of the burden of the increased duty while receiving none of the benefit even in the first instance arising

(1) [1914] 2 Ch. 283, 757.

C. A. 1915

BODEGA COMPANY v. MARTIN.

Astbury J.

from the premises being licensed, especially when the true owners had contracted to grant the lease and the execution of the formal lease itself was merely the carrying out of their and not of his contract, would not, in my judgment, be following the decision in *Read's Case* (1), in which no such issue was involved, or be observing any deduction which should be fairly drawn therefrom.

Subject, therefore, to what is involved in the decision that an assignee is not a grantor within the meaning of the Act, and that the receipt of rent cannot make him so, I am bound, I think, to form my own conclusion upon the true construction of the Act in so far as the issue in this case is concerned. This may involve the question whether I ought in this case to depart from the grammatical and ordinary sense of the words "grantor of the lease" in construing s. 2.

The rule of construction to be applied is clear. It was laid down by Burton J. in *Warburton* v. *Loveland* (2) and adopted as a universal rule by Lord Wensleydale in the House of Lords in *Grey* v. *Pearson* (3) "that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Notwithstanding the admirable argument and warning of the plaintiffs' counsel I have come to the conclusion that to hold Martin to be a grantor of the lease in question within the meaning of the Act would lead not only to a grave miscarriage of justice, but to an absurdity and to repugnancy and inconsistency with the context in which the words are found.

When a statute is making an apportionment of burden between persons entitled to a benefit, as I hold this statute was obviously intended to do, it seems to me absurd to hold that one of the persons to bear a proportionate part of the burden is one who is and always has been a stranger to the benefit, nor do I

(1) [1914] 2 Ch. 283, 757. (2) (1828) 1 Hud. & B. 623, 648.
(3) (1857) 6 H. L. C. 61, 106.

think it consistent or in harmony with the scheme of the section, taking its language as a whole, to hold that the expression "grantor of the lease" means or was intended therein to include a person who merely put his hand and seal to the lease of another, as I think was the case as far as Martin was concerned. I am aware that where by the use of clear and unequivocal language capable of only one meaning anything is enacted by the Legislature, it must be enforced even though it be mischievous and absurd, but I do not think that the section I have to construe meant by the words "grantor of the lease" one who was not in substance and in fact the real grantor and who was never entitled to receive and apply for his own benefit the fund out of which compensation, by way of apportioned payment, was in my opinion to be made.

This is a section having only a retrospective operation, and it is difficult to believe that the Legislature, in employing the words "grantor of the lease," contemplated and intended the imposition of a heavy personal liability upon a trustee or agent after acting in accordance with and not in breach of his duty years after all funds in his hands to which he would be entitled to look for indemnity had been distributed, and so become unavailable for his protection. If this be so, it involves a startling departure from the law as hitherto observed in relation to persons occupying these positions. How far, if at all, it may be held that the section in question has travelled in this direction, it is fortunately not necessary for me to discuss. It is sufficient for me to hold, as I do, that a person who, in the position of the defendant, merely executed by way of machinery a lease for the purpose of giving effect to a contract to grant it entered into by and binding upon the true owners of the property prior to his becoming interested as mortgagee thereof, and on the faith of which contract being performed he agreed to lend his money, was not the grantor of the lease within the true meaning and intent of the section. In so deciding, I am, in my opinion, acting in accordance with the canon of construction above referred to, and not in any way failing to give effect to the decision in *Read's Case* (1) or any conclusion that I ought

(1) [1914] 2 Ch. 283, 757.

C. A. 1915

BODEGA COMPANY v. MARTIN.

legitimately to draw from the language of the judges who decided it.

The action in consequence must be dismissed with costs.

G. R. A.

C. A.

From this decision the plaintiff company appealed. The appeal was heard on July 23, 1915.

Hon. Frank Russell, K.C., and *Harold Burrows*, for the appellants, repeated the arguments advanced by them in the Court below, and in addition referred to *Watney, Combe, Reid & Co.* v. *Berners.* (1)

Roope Reeve (*Gordon Hewart, K.C.*, with him), for the respondent. The question is whether the words "grantor of the lease" mean substantially the grantor or merely the person who by way of machinery puts his hand to the lease and executes it.

[LORD COZENS-HARDY M.R. The question is rather, who in this case was "the grantor"?]

It is submitted that the co-adventurers Lavery, Steel, and Kirk were in reality the grantors. A case like this can seldom occur, and no doubt the onus is upon the person who ostensibly, but not in substance, is the grantor to show that he is not in fact the grantor.

[PICKFORD L.J. It is hard upon the tenant to have to inquire into the circumstances under which his lease was granted.]

The hardship is admitted, but there is nothing in the section which binds the Court to hold that "the grantor" must be the legal and not the equitable grantor.

[LORD COZENS-HARDY M.R. This Court has decided the point in *Bodega Co.* v *Read.* (2)]

There the question was as between the person who signed the lease and the assignee of the reversion, and the decision went no further than that. Supposing the plaintiffs were suing upon an agreement for a lease which had never been actually executed, who would then have been the grantor? It is admitted that

(1) [1915] A. C. 885; reversing the decision of the C. A. [1914] 3 K. B. 288.

(2) [1914] 2 Ch. 757.

Martin was at law the grantor, but if he had sued for and recovered rent under the lease he would have been bound to account for it to the co-adventurers. He might have been redeemed. He could not have effectually granted any other lease than that which the co-adventurers had arranged should be granted to the plaintiffs. The whole transaction was absolutely arranged before he had anything to do with it. He was never treated as the owner except for the purpose of executing the lease which had been arranged for. It is not conclusive simply to produce an indenture of lease and say that the person who signed it is "the grantor." The Court must be able to look into the circumstances under which the deed was executed, and is not bound to say that the person who puts his hand to the lease and executes it by way of form is "the grantor."

[PICKFORD L.J. It was not mere form in this case, because Martin did what he did in order to better his security.]

If the substance of the transaction is looked at it is plain who were the grantors. Martin was a mere agent in a similar position to that of the executor of a testator who had agreed to grant a lease but had not signed it before he died, or a person who executed a lease on behalf of an infant.

[No reply was called for.]

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J., and it seems to me that it is not open to us to take any other view than that his decision is wrong. The case arises under s. 2 of the Finance Act, 1912, which is a difficult section to construe. It was intended to give certain rights as to the incidence of the burden of the extra duty imposed upon a free public-house as distinguished from a tied public-house, and it contains a provision that the grantor of the lease is liable, under certain circumstances, to make a partial contribution (using a perfectly general term) in respect of the extra burden imposed by the Finance (1909-10) Act, 1910, upon licensed property. It uses the words "the grantor," and it was held with reference to this very property, in an action commenced by the Bodega Company against Read, that the "grantor of the lease" is a phrase which must be construed strictly as meaning

C. A. 1915

BODEGA COMPANY v. MARTIN.

Lord Cozens-Hardy M.R.

the original grantor of the lease, and did not include the person who, for the time being, was entitled to receive the rents and profits of the property. Now, it is not disputed that the lease of May 11, 1892, was made between Mr. Martin and the defendants the Bodega Company. It was a long lease for ninety-nine years, and the rent was 900*l*. It is not and cannot be disputed that Read, who was the assignee of the reversion, because Mr. Martin had ceased to have any interest in the property, was not liable to contribute anything by virtue of s. 2 of the Finance Act, 1912. This Court affirmed the decision of Warrington J., as he then was, and in the judgment which was delivered unanimously by this Court affirming Warrington J. we said (I will only read a few sentences from my judgment) (1): "Relief is given against the grantor of the lease. Who is the grantor of the lease? Undoubtedly Martin." It is quite plain that Read was not the grantor of the lease. It was said that the only effect of that decision was that Read was not the grantor of the lease. I think that is not so. We held that Martin was the grantor of the lease, and was the person who was contemplated by the section of the Act of Parliament. But then it is said, although that is true, although Martin took a conveyance of the property and granted this lease, if you go behind that you will come to the conclusion that the transaction represented by the lease by Martin to the Bodega Company was a lease the terms of which were not settled by Martin at all, but were settled by three other people, Steel, Lavery, and Kirk, and that they are really the people who arranged the terms, and it was proved that Mr. Martin was only a wealthy man who financed these three people, or some of them, finding the money to complete the original purchase and also the money to rebuild the property, which was ultimately leased, as to the ground floor and basement to the Bodega Company, and as to the first and second floors to some other people. It is said that by "grantor of the lease" you must consider somebody who really had a beneficial interest in the lease and who did not merely hold it for somebody else. I do not think it is open to us to put that interpretation upon the words "grantor of the lease." There is no definition clause in the Act to warrant

(1) [1914] 2 Ch. 761.

any such enlargement or alteration in the meaning of the term. "Grantor of such lease," in an Act of Parliament dealing with real property, is a technical term, and I ask myself, assuming all the circumstances which Mr. Roope Reeve has put before us, who still is the grantor of the lease? I can only look at the lease itself, and I find from the lease itself that Mr. Martin was the grantor. I find also on the evidence that he made it a term of his advance that the property should be taken in his name, and that he should grant the lease and get, as he did, the direct covenant of the Bodega Company, which was a highly solvent company. He did that for his own security, and therefore he must take the consequence. In my opinion it is not open to us in this Court to listen to the argument which has been brought before us. We are bound to hold that the grantor of the lease within the meaning of this section is the man who did grant the lease, the man whose deed under his seal created the term of years which is vested in the Bodega Company. I hope, because I merely say I think we are bound to hold, that it will not be supposed that I have any doubt as to the correctness of the decision to which we came less than twelve months ago. In my opinion the appeal must be allowed, with the usual consequences.

PICKFORD L.J. I agree. I think this case is covered by the decision of *Bodega Co.* v. *Read.* (1) When I say "covered by the decision," the actual decision there was that the assignee was not the grantor; but it is covered by the reasoning, which goes to this: that it is the person whose hand and seal are put to the deed. That seems to me to have been decided in that case, and I do not think we have any right to go behind it. I think it is probably a hard case, but whether the decision merits all the epithets that Astbury J. has ascribed to it I do not know. It may be so, but if so, it is the result of the Act of Parliament and not the result of anything else. We have no right to look behind an Act of Parliament and say that we think it would be much more just to do something else. That is what this Court said in the case of *Bodega Co.* v. *Read* (1), which, in my opinion, is binding upon us.

(1) [1914] 2 Ch. 757.

C. A. 1915 BODEGA COMPANY v. MARTIN.

WARRINGTON L.J. I agree. I think also that the case is governed by *Bodega Co.* v. *Read* (1), and hesitate to quote my own judgment, but as it was affirmed by the Court of Appeal I think I may repeat what I said then as being exactly what I should desire to say now (2): "What is the prima facie meaning of the words 'the grantor of the lease'? I think they mean quite plainly the man who puts his hand and seal to the document in question—the man who grants the land for the term for which it is to be vested in the lessee." Now, there can be no question that the defendant here was the person who granted the land for the term that was to be vested in the lessee. At the date of the lease he was owner in fee simple of the premises under a conveyance to himself in fee, and he had himself found the purchase-money with which the property was bought. It is true that, by some arrangement between himself and three persons who are said to have entered into this transaction as an adventure, he may properly have been treated as mortgagee, but beyond that there is nothing in the circumstances to show that he was otherwise than a person seised in fee simple, and granted the lease as such. I only mention that because it has been contended that the defendant in this case was, in form only, the grantor. I do not accept the proposition that, if he had been, he would not have been the grantor within the meaning of this Act of Parliament. That is a question which may have to be discussed; but at any rate I do not propose to accept the contention that he was not the grantor. All I say about it is that he certainly was not in form only the grantor, but he was in substance the grantor, and he granted the lease for, amongst other things, his own better security. I agree that the appeal must be allowed.

Hon. Frank Russell, K.C. A small point then arises upon the notice of appeal. There is an alternative claim in the notice for a declaration that the plaintiff company is entitled to recover as a debt due from the defendant so much of the increased duty as may be agreed upon in proportion to (*a*) the increased rent and premium payable in respect of the premises, or alternatively

(1) [1914] 2 Ch. 757. (2) [1914] 2 Ch. 290.

(*b*) the increased rent. The words in the section are "proportionate to any increased rent or premium." It is suggested on behalf of the defendant that, there being reserved in this particular lease both a rent and a premium, in ascertaining the proportion under the section we are not entitled to take both rent and premium into account, but, having regard to the use of the word "or" in the section, we must make our choice between rent and premium.

[LORD COZENS-HARDY M.R. You had better take a declaration in the words of the section.]

It is desired to leave the point to be discussed unless the Court will indicate their view for the benefit of the county court judge before whom the matter will now go. The point has never been decided. In *King* v. *Earl Cadogan* (1) a lease was granted in consideration of a rent and of a certain sum to be expended upon the building, and the question was whether that sum was a premium within the meaning of the section. It was held that it was not, but it was never suggested that if it had been a premium, there being a rent, the claimant was not entitled to have both.

If the declaration follows the words of the Act we desire that it shall not be said against us in the county court that this Court has decided the point against us.

[LORD COZENS-HARDY M.R. Certainly not; merely as a dictum I think just the contrary.]

Then the county court judge will have to apportion the rent, and the premium if he thinks any part of the premium is increase.

[LORD COZENS-HARDY M.R. Yes.]

Solicitors: *Treherne, Higgins & Co.; King, Adams & Co.*

(1) [1915] 1 K. B. 821.

G. A. S.

C. A.
1915

NEVILLE J.
July 16.

C. A.
July 29.

VENNER'S ELECTRICAL COOKING AND HEATING APPLIANCES, LIMITED *v.* THORPE.

[1915 V. 499.]

Company—Winding-up—Landlord and Tenant—Rent payable in advance—Distress for Rent before Commencement of Winding-up—Injunction.

A company was tenant of premises at a yearly rent payable in advance. The lessor distrained before the commencement of the winding up of the company for a year's rent in advance that had accrued due :—

Held, that the fact that the rent was payable in advance was not a special reason for restraining the lessor from proceeding with his distress.

Decision of Neville J. affirmed.

MOTION.

By a lease dated August 18, 1914, the defendant demised to the plaintiff company certain premises for a term of fourteen years from Midsummer, 1914, at the rent of 300*l.* for the year expiring June 24, 1915, and thereafter at the rent of 350*l.* per annum payable in advance, and so that the first year's rent should be paid on the company taking possession and the rent for the second year and each subsequent year should be paid on March 25 preceding the commencement of the year for which it was paid. The lease was determinable by the company at the end of the third and seventh year.

The company duly paid the rent for the first year of their tenancy, but the rent for the second year commencing June 25, 1915, and which became payable on the preceding March 25, 1915, was not paid. On July 2, 1915, the defendant, having obtained leave under the Courts (Emergency Powers) Act, 1914, levied a distress upon the premises for the second year's rent less a sum of 42*l.* 10*s.* 6*d.* which (by some oversight) had been overpaid on the first year's rent.

On July 5, 1915, the company passed an extraordinary resolution for voluntary winding up, and appointed a liquidator. On July 7 the liquidator duly served on the defendant a notice under the Law of Distress Amendment Act, 1888, requiring the bailiff not to sell for a further ten days, and on July 14 the

writ in this action was issued claiming an injunction to restrain the defendant from proceeding with his distress. The plaintiffs now moved for an interlocutory order. In the meantime, on July 14, a creditors' petition for a compulsory order had been served on the company and was returnable on July 27.

The motion was heard before Neville J. on July 16, 1915.

W. Lavington, for the motion. There is no direct authority where a distress for rent payable in advance has been levied before the commencement of the winding-up, but in *Shackell & Co.* v. *Chorlton & Sons* (1) a distress for rent payable in advance was levied after the commencement of the winding-up, and it was held that the landlord was only entitled to be paid in full for the period the liquidator remained in occupation of the premises, and must prove in the winding-up for the balance of the rent. The same principle should be applied here. It is not disputed that the landlord must be paid in full for the period during which the liquidator remains in occupation of the premises: Buckley on Companies, 9th ed. p. 334; but it is submitted that he must prove for the balance in the winding-up, and is not entitled to be paid the year's rent in full unless he can show some special equity or that it ought to be paid as one of the expenses of the winding-up: Woodfall's Landlord and Tenant, 19th ed. pp. 516, 517.

[NEVILLE J. It seems to me that where the distress is levied before the winding-up the liquidator must show that it is inequitable to allow the landlord to proceed, but where the distress is levied after the winding-up the lessor must show that it is equitable that he should be allowed to proceed.]

The Court has a discretion in the matter—*In re Roundwood Colliery Co.* (2)—and it is submitted that here there are special reasons why it is inequitable that the landlord should be allowed to proceed. The facts that the rent is payable in advance and that the 42*l.* overpaid, if apportioned, covers the rent from June 25 to August 10, by which time the liquidator will probably disclaim the lease, are special reasons for restraining the sale. Further, a forced sale will be disastrous for the company,

(1) [1895] 1 Ch. 378. (2) [1897] 1 Ch. 373, 380.

C. A. 1915

VENNER'S ELECTRICAL COOKING AND HEATING APPLIANCES, LIMITED v. THORPE.

and the landlord, if he is paid the year's rent in advance, will obtain a great advantage over the other creditors of the company.

B. A. Hall, for the landlord. The fact that the rent is payable in advance is not of itself a special reason for restraining the sale. There has been no oppressive conduct or want of good faith on the part of the landlord. The 42*l.* has been allowed for. The rent became payable in advance on March 25 last and the distress was not levied until July 2. On the authorities no ground is shown for depriving the landlord of the fruits of his diligence: *In re Great Ship Co.* (1); *Ex parte Millwood Colliery Co.* (2); *In re Perkins Beach Lead Mining Co.* (3); *In re North Yorkshire Iron Co.* (4)

NEVILLE J. This motion raises a question of some importance in connection with the winding up of companies. It is whether the principle applicable to a distress for rent levied after the commencement of the winding-up where the rent is payable in advance ought to be applied to a distress for rent payable in advance levied before the commencement of the winding-up. I think nothing of the 42*l.* paid by some mistake in excess of the previous year's rent, and which has been allowed for by the landlord. In my opinion it merely reduces the amount for which the landlord can distrain and does not affect the case. In the absence of authority I do not feel justified in holding that the rent being payable in advance is a fact that makes it inequitable for a landlord to proceed with a distress levied for the rent before the commencement of the winding-up. In my opinion the motion fails and must be dismissed.

H. L. F.

C. A. From this decision the plaintiffs appealed. The appeal was heard on July 29, 1915.

W. Lavington, for the appellants, repeated the arguments used by him in the Court below.

B. A. Hall, for the respondent, was not called upon.

(1) (1863) 4 D. J. & S. 63.
(2) (1876) 24 W. R. 898.
(3) (1877) 7 Ch. D. 371.
(4) (1878) 7 Ch. D. 661.

LORD COZENS-HARDY M.R. The question is this: The landlord let some premises to the company upon terms that certain rent should be payable in advance. The landlord put in a distress for this rent before the commencement of the winding up of the company; the company has now been voluntarily wound up; and the liquidator seeks to restrain the landlord, who is in possession under his distress, from completing the levy and so realizing the amount due to him. It is not and could not be disputed by Mr. Lavington that at common law a landlord may have a right to distrain for rent payable in advance; and if rent is payable in advance, the apportionment of the rent de die in diem does not arise at all.

Then it was said that it is not equitable that the landlord should sweep off the assets of the company to the prejudice of the other creditors. That contention was most satisfactorily dealt with, I think, by Stirling J., as he then was, in *In re Roundwood Colliery Co.* (1) In that case Stirling J., quoting Turner L.J. in *In re Great Ship Co.* (2), said: "The true question therefore is, what circumstances ought to influence or guide the Court in the exercise of that discretion. In my judgment the Court, in dealing with a question thus dependent on its discretion, is bound to look at the legal rights of the parties, and at the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the Master of the Rolls, that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the Court. I think it is the duty of the Court to hold an even hand between the interests of all the parties, and I take this section to have been introduced into the Act of Parliament very much with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company." Applying that to the present case, here the landlord is exercising his legal rights, and I think it is indisputable that

(1) [1897] 1 Ch. 373, 380. (2) 4 D. J. & S. 69.

C. A. 1915

VENNER'S ELECTRICAL COOKING AND HEATING APPLIANCES, LIMITED v. THORPE.

Lord Cozens-Hardy M.R.

no equitable ground has ever been made out for restraining the landlord from levying the distress, unless there have been some circumstances outside the levying, such as fraud, or unfair dealing, which would entitle the tenant to an injunction. Apart from that, it does not appear to me to be inequitable that the landlord should exercise his right of distress even though there be a subsequent winding up of the company. That is the view of Neville J. and that is the only point that arises here. I think that point fails, and this appeal must be dismissed with the usual consequences.

PICKFORD L.J. I agree.

WARRINGTON L.J. I agree; and I only desire to add this, that Stirling J., after reading that quotation from Turner L.J., sums up the result in his own words in these terms (1): "The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so." I cannot in this case find any special reason rendering it inequitable that he should be allowed to proceed to enforce his legal right.

Solicitors: *Strong & Bolden; Lee & Pembertons.*

(1) [1897] 1 Ch. 381.

G. A. S.

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) *v.* ANGLO-BELGIAN AGENCY, LIMITED.

C. A. 1915

YOUNGER J. *July* 27, 29

C. A. *July* 29, 30.

[1915 S. 2281.]

War—Trading with Enemy—Company incorporated in Belgium—Right to sue in English Courts—"Enemy"—"Enemy Country"—Territory in Hostile Occupation—Trading with the Enemy Act, 1914 (4 & 5 *Geo.* 5, c. 87), *s.* 1—*Trading with the Enemy Amendment Act*, 1914 (5 & 6 *Geo.* 5, c. 12), *s.* 1—*Trading with the Enemy Amendment Act*, 1915 (5 & 6 *Geo.* 5, c. 79), *s.* 2—*Trading with the Enemy Proclamation No.* 2 (*Sept.* 9, 1914), *clauses* 2, 3—*Trading with the Enemy* (*Occupied Territory*) *Proclamation* (*Feb.* 16, 1915).

By the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2, it is rendered illegal during the war to trade with the enemy, i.e., to do any act prohibited by proclamation. By a Proclamation dated September 9, 1914, clause 3, the expression "enemy" in this Proclamation means "any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." By the same Proclamation the expression "enemy country" means "the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof."

By the Trading with the Enemy Amendment Act, 1914 (5 & 6 Geo. 5, c. 12), a custodian trustee was appointed, to whom any person holding or managing property for or on behalf of an enemy is bound to make a return of such property; and by the preamble to that Act, "enemies" are defined as being "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war."

By a Proclamation dated February 16, 1915, it was provided (clause 1): "The proclamations for the time being in force relating to trading with the enemy shall apply to . . . . territory in hostile occupation as they apply to an enemy country."

By the Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. 5, c. 79), s. 2, the provision of the principal Act (i.e., 5 & 6 Geo. 5, c. 12) requiring returns to be made to the custodian trustee was extended to balances and deposits standing to the credit of enemies at any bank.

The plaintiff company was incorporated under the laws of Belgium and had its registered office at Antwerp. After the outbreak of war between Great Britain and her Allies (including Belgium) and Germany, a large portion of Belgium (including Antwerp) being in the effective military occupation of Germany, the company's business at Antwerp was closed, and the books were removed to London, where the business

C. A.
1915
SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

was now wholly carried on, but the chairman of the company was still in Antwerp. The defendants, who acted as bankers for the company, had declined to pay a cheque drawn upon them by the company on the ground that the company was "technically an enemy"; and they proposed to make a return to the custodian trustee of the moneys held by them on the company's behalf. In an action by the company for a declaration that it was not an enemy within the meaning of the Trading with the Enemy Acts and the Proclamations relating to trading with the enemy, and an injunction to restrain the defendants from making any return to the custodian trustee of any property in their possession or under their control to which the company was entitled:—

Held by Younger J., (1.) that the company was not an enemy of the King at common law and was therefore entitled to sue; (2.) that the company must for the purpose of the Proclamation of September 9, 1914, be treated as an "enemy" within the Proclamation of February 16, 1915, and could not therefore successfully demand payment of the cheque; and (3.) that the company was not an "enemy" within the Trading with the Enemy Act, 1914, or the Trading with the Enemy Amendment Act, 1915, and that the defendants must therefore be restrained from making a return to the custodian trustee.

Held by the Court of Appeal, that the company being incorporated in Belgium was not incorporated in an enemy country, for although a large portion of that country was in the effective military occupation of an enemy, yet the country as a whole was not territory in hostile occupation. The company was not an "enemy" within the meaning of any of the Acts or Proclamations.

Decision of Younger J. varied.

MOTION.

The action was brought by the plaintiff company (1.) for a declaration that it was not an enemy within the meaning of the Trading with the Enemy Acts and the Proclamations relating to trading with the enemy, or, alternatively, that ss. 1 to 5 (both inclusive) of the Trading with the Enemy Amendment Act, 1914, did not apply to the plaintiff company, and (2.) for an injunction to restrain the defendant company from making any return under s. 3 of the last-mentioned Act, under s. 2 of the Trading with the Enemy Amendment Act, 1915, and under any other section of any of the Trading with the Enemy Acts, of any property in the possession or under the control of the defendant company to which the plaintiff company was entitled. (1)

(1) By the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2, it is rendered illegal during the war to trade with the enemy, i.e., to do any act prohibited by proclamation.

By a Proclamation dated September 9, 1914, clause 3, the expression

The plaintiff company now moved for an injunction in the terms of the second branch of its claim.

The following statement of facts is taken from the judgment of Younger J. :—

"The plaintiff company is a company incorporated under the laws of the Kingdom of Belgium and was registered there on April 1, 1898. Its registered office was, and, so far as I know, still is, at 95, Avenue des Arts in the city of Antwerp; and, prior

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"enemy" in this Proclamation means "any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." By clause 2 of the same Proclamation the expression "enemy country" means "the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof."

By the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), a custodian trustee was appointed, to whom any person holding or managing property for or on behalf of an enemy is bound to make a return of such property; and by the preamble to that Act, "enemies" are defined as being "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war."

By the Trading with the Enemy (Occupied Territory) Proclamation, February 16, 1915, it is provided (clause 1): "The proclamations for the time being in force relating to trading with the enemy shall apply to . . . . territory in hostile occupation as they apply to an enemy country."

By the Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. 5, c. 79), s. 2, the provision of the principal Act (5 & 6 Geo. 5, c. 12) requiring returns to be made to the custodian trustee was extended to balances and deposits standing to the credit of enemies at any bank.

Sect. 3 provides: "Sections six, seven, and eight of the principal Act shall apply as if the expression 'enemy' where used in those sections, included any person or body of persons who is an enemy or treated as an enemy under any proclamations relating to trading with the enemy for the time being in force:

"Provided that the said sections six and eight shall apply as respects persons who were not enemies, nor treated as enemies, under the proclamations in force on the nineteenth day of November nineteen hundred and fourteen, with the substitution of references to the nineteenth day of July nineteen hundred and fifteen for references to the said nineteenth day of November, and of references to the date of the passing of this Act for references to the date of the passing of the principal Act, and except in cases where a licence has been duly granted exempting any particular transaction from the provisions of any of the said sections."

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

to the occupation of Antwerp by the German army, the business of the plaintiff company was carried on from that office. It appears that soon after the outbreak of the present war the books and papers of the plaintiff company were removed from Antwerp to London; and, although the chairman of the plaintiff company is still resident in Antwerp, and may still be acting there on the plaintiff company's behalf, the business of, or some business on behalf of, the plaintiff company is de facto being carried on from London by three of the five directors of the company, all of them Belgians, now residing here.

"The plaintiff company owns copper and pyrites mines in the Republic of Portugal. These mines are at present being worked, and the whole of the output is being sold, in England and in France. The plaintiff company for the purposes of its business, after the date of the Trading with the Enemy (Occupied Territory) Proclamation of February, 1915, and probably also before that date, deposited moneys with the defendant company to the credit of a current account upon which the plaintiff company could from time to time draw by means of cheques. On July 26 the managing director of the plaintiff company presented to the defendant company a cheque for 100*l.* drawn on the defendant company and payable to the plaintiff company. The defendant company refused to pay the cheque, and it gave its reasons and raised the questions now at issue with the plaintiff company in a letter of July 26, 1915, which is in the following terms: 'Dear Sir,—We regret that we cannot pay the cheque which you presented to-day, as it appears to us that you are technically an enemy. Having regard to the Trading with the Enemy Acts and Proclamations, we must make a return to the Public Trustee of the moneys that we hold on your behalf.'"

The motion was heard by Younger J. on July 27, 1915.

Clauson, K.C., and *P. F. Wheeler*, for the plaintiffs.

Gore-Browne, K.C., and *W. E. Vernon*, for the defendants.

Cur. adv. vult.

July 29. YOUNGER J. read the following judgment:—In this action the plaintiff company claims a declaration that it is not an

enemy within the meaning of the Trading with the Enemy Acts and the Proclamations relating to trading with the enemy, and, alternatively, that ss. 1 to 5 (both inclusive) of the Trading with the Enemy Amendment Act, 1914, do not apply to the plaintiff company; and the questions between the parties are brought before the Court upon a motion for an injunction which, as opened and argued (not as stated), seeks to obtain a decision upon the rights of the plaintiff company in relation to the claims of the defendant company asserted in a letter addressed to the plaintiff company on the 26th of this month.

The action is not hostile, but I was asked to deal with the motion without delay in order that either of the parties might, before the close of the present sittings, have the opportunity, if so advised, of taking the opinion of the Court of Appeal upon the dispute. I quite realize the reasonableness of this position, although I regret that it should have rendered necessary an attempt to deal with matters of importance and difficulty at a time when the pressure of other public duties is very severe. [His Lordship stated the facts as set out above, and referring to the letter of July 26, 1915, continued:] I suspect that the refusal to pay the cheque and the threat to make a return were the results of a desire on the part of both parties to raise for the decision of the Court, and in a convenient form, questions of great importance to each of them and to other companies similarly situated. It is not suggested that the defendant company is seeking to escape from any obligation properly binding upon it; no reflection of any kind is made upon the defendant company.

In the action so raised, the application of the plaintiff company for relief in the form of an injunction was made. Mr. Gore-Browne, on the part of the defendant company, took, and insisted upon, the preliminary objection that the plaintiff company was not entitled to maintain the action at all; that it was an alien enemy "totally exlex," to use Lord Stowell's description, and not entitled to any right of access to the King's Courts. As at present advised, I do not agree with this contention. The plaintiff company is not in my opinion an enemy of the King at common law. Although the greater part of it is occupied by the German army, Belgium has not yet been, and we may hope

C. A. 1915

SOCIÉTE ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Younger J.

never will be, annexed to the German Empire; and no Belgian is yet the subject of a State at war with His Majesty. No authority was adduced to show that the rule depriving an alien enemy of any right to maintain an action in these Courts, unless under licence, express or implied, from the Crown, extends to a person who is not either the subject of, or resident or carrying on business in, a State at war with His Majesty; and the Court, unless constrained by authority, or except to the extent to which it is required by proclamation or statute so to do, would, I apprehend, hesitate long before it refused to extend its protection to the subject of a State which, so far from being an enemy, is the closest ally of the King. But, while the plaintiff company's claim cannot, in my opinion, be disposed of in such summary fashion, it does not by any means follow that it can successfully be maintained either in whole or in part. Whether the plaintiff company can demand payment of its cheque, or, putting it more correctly, whether the defendant company may lawfully pay the proceeds of the cheque to the plaintiff company, and whether the defendant company is or is not bound to make a return to the Public Trustee of the moneys which it holds on behalf of the plaintiff company, are questions both of which may well be decided against the plaintiff company, even although access to the Court is open to it; and, indeed, the view I do take is that the first of these questions should be decided against the plaintiff company, and the second in its favour.

The answer to the first question turns upon the Proclamation against trading with the enemy of September 9, 1914, and the Trading with the Enemy (Occupied Territory) Proclamation of February, 1915. Is the plaintiff company an enemy within the meaning of these Proclamations? If so, is the payment of money to the plaintiff company, or to any agent in this country on its behalf, prohibited? I think that the answer to both questions is in the affirmative. In clause 3 of the Proclamation of September 9, 1914, the expression "enemy" is defined as follows: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy

nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." If, therefore, Belgium were an enemy country, it is, I think, clear that the plaintiff company, being incorporated there, would be an enemy within the meaning of that Proclamation, and none the less so because some business on its behalf, or even all business on its behalf, is being conducted elsewhere. And the effect of the Trading with the Enemy (Occupied Territory) Proclamation, clause 1, is, I think, to make occupied Belgium enemy territory for the purpose of, amongst other things, the September Proclamation. That clause is as follows: "The Proclamations for the time being in force relating to trading with the enemy shall apply to territory" (then I miss out the immaterial words) "in hostile occupation as they apply to an enemy country." It is, of course, not disputed that the city of Antwerp is in hostile occupation. The plaintiff company must, therefore, now, I think, for the purposes of the September Proclamation, be treated as being incorporated in an enemy country, and as being an enemy. If so, it is hardly disputed that the payment of any sum of money to, or for the benefit of, the plaintiff company is prohibited by clause 5, sub-clause 1, of the Proclamation of September; and the defendant company, if it made the payment, would be guilty of a misdemeanour under s. 1 of the Trading with the Enemy Act, 1914.

The plaintiff company can, accordingly, obtain no relief in respect of the refusal of the defendant company to honour cheques drawn by the plaintiff company on its account.

But is the defendant company entitled or bound to make a return to the Public Trustee as custodian under the Trading with the Enemy Amendment Act, 1914, of the moneys held by it on behalf of the plaintiff company? That depends upon the question whether the plaintiff company is an enemy within the meaning of s. 3 of that Act, the section which requires the return to be made. Now in considering this question, it must first be noted that in the Trading with the Enemy Acts, now three in number, although a group of statutes to be cited together (see Trading with the Enemy Amendment Act, 1915, s. 5), the word

C. A.
1915
SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.
Younger J.

"enemy," the most important word in the statute, is not used in the same sense throughout all the Acts, and now, is not always used in the same sense in the same Act. An enemy, in the original Trading with the Enemy Act, is an enemy in the sense of the Proclamation. That appears from s. 1, sub-s. 2, of the statute, which is to the following effect: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy." But an enemy for the purposes of the Trading with the Enemy Amendment Act, 1914, is more narrowly defined. "Enemies" are defined in the preamble to that Act as "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war." Now Belgium, as an occupied country, does not come within the meaning of that definition, and, accordingly, the property of a Belgian resident or carrying on business in Belgium is not property of which any return is required to be made under s. 3.

Of course at the date of the passing of that Act (November 27, 1914) the Trading with the Enemy (Occupied Territory) Proclamation of February, 1915, had not been promulgated; but the effect of the restricted definition of "enemy" in the statute had this result: that the February Proclamation, while it extended the meaning of the word "enemy" in the original Act, left its meaning in the Amendment Act untouched.

The matter, however, has been further affected by the last Trading with the Enemy Amendment Act of 1915, which was passed the other day. (1) That Act, by s. 3, alters the meaning of "enemy" in ss. 6, 7, and 8 of the first Amendment Act so as to give it in effect the same meaning as that in the Proclamations and the original Act; but, although it in other respects amends and extends s. 3 of the first Amendment Act, it leaves the

(1) The Act did not in fact receive the Royal assent till the afternoon of July 29, after this judgment had been delivered.—W. I. C.

meaning of "enemy" in that section untouched. The result is very startling. Any one owing money to a Belgian in Belgium must now keep it; he must not pay it to the Belgian, because, within the meaning of the Proclamation, the Belgian is an enemy; and he may not pay it to the custodian because, within the meaning of s. 2 of the first Amendment Act, the Belgian is not an enemy. Again the taint of the enemy is attached to a Belgian's transactions under ss. 6, 7, and 8 of the first Amendment Act, because, by virtue of the recent Act, a Belgian resident in Belgium is an enemy within the meaning of these sections; but no return of that same Belgian's property is required to be made under s. 3, because, within the meaning of that section, he is not an enemy at all. Perhaps, however, this is merely another illustration of the different senses in which the word "enemy" is now used in the law. It has one signification at common law: it is used in another sense in the Courts Emergency Powers Act and in the Aliens Restriction Order; in a third, in the Proclamations as now promulgated; and in a fourth, in, amongst other places, s. 3 of the Trading with the Enemy Amendment Act, 1914. It is fortunate for the plaintiff company that this is so, because in my opinion it entitles it (no objection being taken to the relief being granted) to an injunction restraining the defendant company until trial or further order from making any return under s. 3 of the Trading with the Enemy Amendment Act, 1914, and under s. 2 of the Trading with the Enemy Amendment Act, 1915, of any property held or managed by the defendant company for or on behalf of the plaintiff company.

I desire only to add that there is no evidence as to the character of the shareholders in the plaintiff company, whether as to personality, nationality, residence, place of business, or otherwise. There is no evidence as to the power, if any, by Belgian law, conferred upon any casual majority of directors of the plaintiff company, nor upon the questions whether they are empowered to carry on business on behalf of the company, or whether they have any greater power in that behalf than the chairman of the company who remains resident in Antwerp, or than any other person or body of persons within the company. It may be that it was not necessary for the plaintiff company to

C A.
1915
SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

condescend upon evidence on any of these points. I only desire to draw attention to the fact that there is no kind of evidence with regard to any one of them. Under these circumstances I think the plaintiff company is entitled to the injunction which I have indicated, and I suppose the costs will be costs in the action.

W. I. C.

The defendants appealed against this decision upon the first and third points, and the company entered a cross-appeal against the decision upon the second point.

Special leave having been given to expedite the hearing of the appeal and cross-appeal, the case came on before the Court of Appeal on the same day that judgment was given by Younger J.

Gore-Browne, K.C., and *W. E. Vernon*, for the appellants. The plaintiff company is an "enemy" and is not entitled to sue in the Courts of this country: *M'Connell* v. *Hector*. (1) Places belonging to a belligerent which are in the military occupation of the enemy are for the purposes of trade with the enemy to be treated as enemy country: Hall's International Law, 6th ed. p. 502.

Clauson, K.C., and *P. F. Wheeler*, for the respondents. The plaintiff company is not the subject of a State which is at war with the King, and the Courts of this country are not shut against it. The company is not an "enemy" and is entitled to sue in the Courts of this country. But it is said that the company is incorporated at Antwerp in a country which is occupied by the enemy, i.e., an enemy country: Trading with the Enemy (Occupied Territory) Proclamation, February 16, 1915. On the contrary the company is incorporated in a friendly country. It is not resident nor carrying on business in a country with which His Majesty is at war. The company is incorporated in Belgium, which is not an enemy country. Belgium is not an enemy country merely because, for a particular purpose of the Occupied Territory Proclamation, parts of it, being in the occupation of the enemy, are to be treated as enemy country.

Gore-Browne, K.C., in reply.

Cur. adv. vult.

(1) (1802) 3 Bos. & P. 113.

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

July 30. LORD COZENS-HARDY M.R. This action was commenced, doubtless by arrangement, to settle points of great importance under the Trading with the Enemy Statutes and Proclamations. Younger J. gave his judgment yesterday morning, and we heard the appeal yesterday afternoon. Had circumstances permitted I might have taken a longer time to consider the case; but as it is I think it desirable at once to give judgment.

The facts are few, and not in dispute. The plaintiffs are a company incorporated under the laws of Belgium. Their registered office is at Antwerp. Soon after the outbreak of war the business at Antwerp was closed, and the books were removed to London. The larger part of Belgium, including Antwerp, is now in the effective military occupation of Germany. The business of the plaintiff company is now wholly carried on in London. The company has mines in Portugal, and the whole of the output is now being sold in this country, or in France. The defendants have acted as bankers for the plaintiff company. The plaintiff company drew a cheque for 100*l.* on the 26th inst. which the defendants declined to pay, alleging that the plaintiff company is "technically an enemy," and stated that they must make a return to the Public Trustee of the moneys held on the plaintiff company's behalf. A writ was then issued seeking a declaration.

On the first point Younger J. held that the plaintiff company had a right of access to the Courts of this country, and was not exlex. I agree with this decision. The plaintiff company is a Belgian company, an artificial person resident in an allied State, and I know no principle, and no authority, which deprives the company of the right of applying to our Courts. The relief which the plaintiffs can obtain is another matter.

By the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), which received the Royal assent on September 18, 1914, it was made illegal during the war to trade with the enemy, that is to say, to do any act prohibited by or under any Royal Proclamation. That is the effect of s. 1, sub-s. 2. By a Proclamation dated September 9 "enemy country" is defined as meaning "the territories of the German Empire and of

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Lord Cozens-Hardy M.R.

the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof"; and by clause 3, "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country"; then come these words: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." The word "only" is emphatic and exclusive. As the plaintiff company was not incorporated in an "enemy country" it was not an "enemy" within the meaning of this Proclamation. An amending Act (chapter 12) received the Royal assent on November 27. It contained a recital of which, perhaps, it is only material to read part: "Whereas it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as 'enemies'), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; and to make other provisions for preventing trading with the enemy." This Act appoints a custodian trustee with very large powers which it is not necessary for me to read in detail, but in s. 3, sub-s. 1, there is a provision which advises trustees and other persons to notify the custodian trustee of property of theirs which the trustees have in their possession or under their control. The next thing to mention is a Proclamation issued on February 16, 1915, dealing to some extent with property which was not in enemy territory, but was in friendly territory in hostile occupation. The Proclamation of February 16, 1915, begins in this way: "Whereas, as a result of the present war, certain territory forming part of the territory of an enemy country, is or may be in the effective military occupation of Us or Our Allies, or of a Neutral State (in this Proclamation referred to as 'territory in friendly occupation'), and certain territory forming part of Our territory or of that of

an allied or neutral State, is or may be in the effective military occupation of an enemy (in this Proclamation referred to as 'territory in hostile occupation'): And whereas it is expedient in Our interest and in that of Our Allies that the Proclamations relating to trading with the enemy should apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and should apply to territory in hostile occupation as they apply to an enemy country:" then it provides: "(1.) The Proclamations for the time being in force relating to trading with the enemy shall apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and to territory in hostile occupation as they apply to an enemy country." It will be observed from the language of that section that it does not in any way treat the whole territory, part of which is in the effective military occupation of an enemy, as being enemy country. On the contrary, I think it certainly implies, although it does not assert, that in the case of Belgium the mere fact that part of Belgium is in the effective military occupation of the Germans does not in any way affect the allegiance of Belgians to King Albert or constitute the whole of Belgium enemy country. It only makes certain provisions as to what may or may not be done with reference to persons in the part entirely in occupation.

We next come to the Trading with the Enemy Amendment Act, 1915, which received the Royal assent yesterday afternoon, and I may perhaps remark that it received the Royal assent after Younger J.'s interpretation of the Act. However, it is now an Act of Parliament, and it makes provisions of great importance. Sect. 2, sub-s. 1, requires returns to be made to the custodian of property held or managed for or on behalf of enemies, and it says that sub-s. 1 of s. 3, which I did not read in full, but read the substance of, "shall apply to balances and deposits standing to the credit of enemies at any bank, and to debts to the amount of 50*l.* or upwards which are due, or which, had a state of war not existed, would have been due, to enemies, as if such bank or debtor were a person who held property on behalf of an enemy." Then s. 3 is important, because it says that ss. 6, 7, and 8 of the principal Act shall apply as if

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Lord Cozens-Hardy M.R.

the expression "enemy," where used in those sections, included any person or bodies of persons who is an enemy or treated as an enemy under any proclamations relating to trading with the enemy for the time being in force. That section enlarges the meaning of "enemy" to some extent, not generally, but only for the purposes of ss. 6, 7, and 8 of the principal Act which are not material to the application before us.

The question for our decision really turns upon the combined effect of the Statutes and Proclamations to which I have referred. If, as I think, the plaintiff company is expressly excluded from the definition of "enemy" in s. 3 of the Proclamation of September, I can find nothing to alter that position.

It is, however, contended that the plaintiff company can no longer be regarded as incorporated in Belgium when Antwerp and almost the whole of Belgium are in the military occupation of the Germans. I cannot follow this argument. The plaintiff company is incorporated not in Antwerp but in Belgium.

It follows that in my opinion the plaintiff company is entitled to a declaration that it is not an "enemy" within the meaning of any of the Acts and Proclamations, and to an injunction to restrain the defendants from making any return under s. 3 of the recent Act.

I am not certain that the point upon which my judgment is based was prominently put before Younger J. It is not alluded to in his judgment.

PICKFORD L.J. This is an appeal from the judgment of Younger J. by which, after expressing the opinion that an alien is entitled to sue in this country, he expressed the opinion also that for the purposes of the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, and the Trading with the Enemy (Occupied Territory) Proclamation, 1915, dated February 16, 1915, the plaintiff company is to be treated as an enemy, but for the purposes of the Trading with the Enemy Amendment Act, 1915, ss. 1 to 5, it is not an enemy. Upon the points that were argued before him I should agree entirely with what he has decided, but a point was raised before us which we are told was not raised before him, or, at any rate, not raised so

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Pickford L.J.

as to bring it really to the notice of Younger J., and that is this: that this plaintiff company is not an enemy for any purpose because it is not incorporated in an enemy country, or in anything that has been made equivalent to an enemy country by any subsequent Proclamation. The question turns only upon two or three passages in the Proclamation. I do not think I need refer to the first Act of Parliament, the Trading with the Enemy Act, 1914, but under that Act, which made it an offence to trade with an enemy, a Proclamation of September 9, 1914, was issued which, so far as it is necessary to read it, was to this effect: "The expression 'enemy country' in this Proclamation means the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof." Then s. 3 says: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country." So far anybody who is resident or carrying on business in the German Empire or the Dual Monarchy of Austria-Hungary is an enemy for the purposes of this Proclamation. I suppose afterwards Turkey was probably added to those enemy countries, and if it stopped there I suppose we should have to treat a limited company as an individual and consider whether it was resident or carrying on business in the enemy country; but it does not stop there. A limited company as an incorporated body is taken out of that definition, for the section goes on in this way: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." Therefore, although an incorporated body might be resident or carrying on business in an enemy country, it was not to have an enemy character attached to it unless it was incorporated in that particular enemy country. No doubt, as we were told, that was for the protection of certain English companies which have trading relations in enemy countries, but the result of it is that in the case of an incorporated body you must find that it is incorporated in an enemy country before you can treat it as an enemy for any of the

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Pickford L.J.

purposes of this Proclamation. This company was incorporated in Belgium. Belgium at this time distinctly was not an enemy country: it was an allied country, and still continues an allied country, and as it was clear, when a considerable part of Belgium, as well as parts of France and parts of Russia, were occupied by the German and Austrian armies, that a question might arise as to whether it was advisable to allow trading with persons who were carrying on business in those particular parts occupied, the Proclamation of February 16, 1915, was published, and that Proclamation, so far as it is necessary to read it, is to this effect: "Whereas, as a result of the present war, certain territory forming part of the territory of an enemy country, is or may be in the effective military occupation of Us or Our Allies, or of a Neutral State (in this Proclamation referred to as 'territory in friendly occupation'), and certain territory forming part of Our territory or that of an allied or neutral State, is or may be in the effective military occupation of an enemy (in this Proclamation referred to as 'territory in hostile occupation'): And whereas it is expedient in Our interest and in that of Our Allies that the Proclamations relating to trading with the enemy should apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and should apply to territory in hostile occupation as they apply to an enemy country: Now therefore We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation declaring, and it is hereby declared, as follows: (1.) The Proclamations for the time being in force relating to trading with the enemy shall apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and to territory in hostile occupation as they apply to an enemy country." It does not say that territory in hostile occupation shall be considered an enemy country, but that the Proclamations shall apply to it as they apply to an enemy country. Therefore I suppose the result of that would be—at any rate, this is the highest to which it can be put—that in clause 3 of the previous Proclamations you must read the proviso as applied to incorporated bodies in this way: In the case of incorporated bodies an enemy character attaches only to those incorporated in an enemy country, or in territory in hostile occupation. It was

argued that that meant this, that wherever a substantial part of a country was in hostile occupation, there any company which was incorporated in that country must be held to be incorporated in an enemy country. I cannot follow that. To take an earlier position of Belgium, in the course of the war, when the Germans were in effective occupation of Brussels and the country round, but were not in occupation, either effective or otherwise, of Antwerp, or of the greater part of the country, it seems to me it would have been impossible to say that this company, which was incorporated in Belgium, and carrying on its business in Belgium, was incorporated in an enemy country. It is not "incorporated in an enemy country," whether that expression be technically accurate or not—it is incorporated under the laws of the country; it has what we call its head office in Antwerp, but it is not incorporated in Antwerp, but is incorporated in Belgium, and it seems to me the only way in which it could be brought under this Proclamation would be if the whole of Belgium were in the hostile occupation, that is to say, were in the effective military occupation, of the enemy. I think in that case, the whole of the country in which it was incorporated being in the effective military occupation of the enemy, and the Proclamation applying to that territory as it applied to enemy country, it might be held—I do not say it would be—that it was incorporated in what had been made an enemy country by the effect of these two Proclamations, or rather I ought not to say made an enemy country, because it was not made an enemy country, but incorporated in some way in which the provision with regard to an enemy country applies, and the only doubt I have in this case is this, whether Belgium as a country ought not, under the circumstances, to be held to be in the effective military occupation of the enemy, although there is a strip in the north-western part of it which is held by us, or the Belgians, or the French, and is in our effective military occupation. It seems to me that if the whole country, with the exception of one small outlying part, were held by the Germans, and they were governing it both by military and civil government, and Germany had held that country because of that occupation, then it might be said, and would be said, that Belgium as a country

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Pickford L.J.

was in hostile occupation as defined by this Proclamation. The only doubt I have is whether that ought not to be said now, in spite of the fact that, as I say, a strip in the north-western part of the country is held by us, or the French, or the Belgians. But I see great difficulties now to that being the correct view. If we advance, as I hope we may at some time, a few miles further into the country, and occupy a larger portion of it, the company would cease to be incorporated in an enemy country, and if after a lapse of a few months we had to retreat again, it would again become a company incorporated in an enemy country, although all the time it was, so far as its trading was concerned and its existence was concerned, exactly in the same position as it was before, namely, incorporated in a country, and carrying on its business in that part of the country, namely, Antwerp, which was in the enemy occupation. Although I have some doubts about that, the other members of the Court do not share my doubts, and, on the whole, I have come to the conclusion that we ought to apply this strictly, and ought not to say, at any rate until the whole of the country is in hostile occupation, that the country in which this company is incorporated is an enemy country. I do not know, but it looks as if the framers of this Proclamation have omitted to deal with the case of an incorporated company. I do not say that there would be no difficulty, but I do not at present see much difficulty, in applying the Proclamation, so far as individuals are concerned. They are either resident or carrying on business in a part of the country which is in hostile occupation or they are not, and there cannot be any very great complications about that. But the case of an incorporated body has rather escaped the notice of the framers of the Proclamation, and, of course, that can be corrected, if it be necessary, by subsequent Proclamation. This company is carrying on business substantially in England. The chairman of the company is still in Belgium, and we were told, or I think it appears in Younger J.'s judgment, he is not in a position to say whether the company is carrying on business in Antwerp or not, but substantially its business is being done in England, and it could only be by a technicality, I think, that it could be called an enemy at the present moment. If it were an

individual I do not think it would be subject to that doubt, and it can only be an enemy by being brought under this definition "being incorporated in an enemy country."

For the reasons I have given, although I confess I have some doubts which are, perhaps, not altogether removed, I agree that the plaintiff company is not incorporated in an enemy country, and therefore the appeal should be allowed.

WARRINGTON L.J. Younger J. by his order has expressed the opinion that for the purposes of the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, and the Trading with the Enemy (Occupied Territory) Proclamation, 1915, dated February 16, 1915, the plaintiff company is to be treated as an enemy. It is on that point that we are differing from Younger J., and it is on that point alone that I desire to say a few words. Is the company an enemy within the meaning of these two Proclamations? The first of the two Proclamations defines the expression "enemy country" as meaning the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof. Therefore under that Proclamation Belgium was not an enemy country. It then proceeds to define the expression "enemy" as meaning "any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country." So far it has not dealt with incorporated bodies in express terms, but it proceeds to do so in the next sentence. "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." The use of the word "only" in that sentence seems to me to be emphatic and is intended to exclude incorporated bodies from the definition in the previous part of the section. The enemy character is to attach and incorporated bodies are to be enemies only if incorporated in an enemy country. To speak of a company as incorporated in a geographical area is of course not accurate, but what is really meant is that a company is incorporated in that country from the proper authority of which it

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LIMITED.

Warrington L.J.

receives that which is equivalent to its charter of incorporation. This company, of course, was incorporated according to the laws of Belgium and receives its charter of incorporation from the authorities of Belgium. It is therefore incorporated in Belgium, which for the purpose of this Proclamation was not an enemy country. It is therefore plain, I think, that the Proclamation of September would not apply to this company.

Now does the Proclamation of February alter that state of things? That Proclamation recites: "Whereas, as a result of the present war, certain territory forming part of the territory of an enemy country, is or may be in the effective military occupation of Us or Our Allies, or of a Neutral State (in this Proclamation referred to as 'territory in friendly occupation'), and certain territory forming part of Our territory or of that of an allied or neutral State, is or may be in the effective military occupation of an enemy (in this Proclamation referred to as 'territory in hostile occupation'): And whereas it is expedient in Our interest and in that of Our Allies that the Proclamations relating to trading with the enemy should apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and should apply to territory in hostile occupation as they apply to an enemy country." The point of those recitals is this: that they, and especially the second of the two which I have just read, draw a clear distinction between territory in hostile occupation and enemy country, but they express in other words that part of an allied State, as it is called in the first of the two recitals, which is in hostile occupation is not enemy country. Then the effective provision of the Proclamation is that "The Proclamations for the time being in force relating to trading with the enemy shall apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and to territory in hostile occupation as they apply to an enemy country." It does not say that that part of a friendly country which is in hostile occupation shall be deemed to be enemy country, but the Proclamations are to apply to the territory in hostile occupation as they apply to an enemy country, again drawing a distinction between the two things. But then it is contended that in the present case, having regard to the extent of the occupation

of Belgium by the German military forces, Belgium must be substantially treated as in hostile occupation. In my opinion we are not at liberty to say that. At the date when this Proclamation of February was issued practically as much Belgian territory was in effective military occupation by the Germans as at the present day, and if that had been the desire of His Majesty it would have been perfectly easy to express that in the Proclamation. But, on the contrary, as I have already pointed out, the Proclamation distinguishes between that part of Belgium which is in hostile occupation and the country of Belgium treated as a friendly country or an allied State, to use the two expressions in the two parts of the recital.

Now can this company be said to be incorporated in a hostile territory? In my opinion that is impossible. The company is incorporated in that State which gives it its position as a corporate body; it is not incorporated in a part of that State; it is incorporated by and under the laws of Belgium and in Belgium.

For these reasons it seems to me that this company cannot properly be described as an enemy for the purpose of those two Proclamations. It has been already decided by Younger J. that it cannot be treated as an enemy for the purpose of that part of the Trading with the Enemy Amendment Act of 1914 which is material. It may be, I do not know, that the result of this decision may be to limit the effect of the Proclamation further than the framers of it intended. That is not a question with which we have anything to do. All we have to do is to interpret the words of the Proclamation as it stands.

In my opinion the order of Younger J. ought to be varied in the manner mentioned by the Master of the Rolls.

Gore-Browne, K.C. The parties having agreed to treat the motion as the hearing of the action, I ask that the declaration be in this form: Declare that for the purposes of the Acts and Proclamations relating to trading with the enemy, and each of them, the plaintiff company is not to be treated as an enemy, and that no notification or return ought to be made under s. 3 of the Trading with the Enemy Amendment Act, 1914, or s. 2

C. A. 1915

SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) *v.* ANGLO-BELGIAN AGENCY, LIMITED.

of the Trading with the Enemy Amendment Act, 1915, and by consent no order as to costs.

LORD COZENS-HARDY M.R. Yes. I think this is an instance of the greatest expedition which any Court of Appeal can show. The case has been tried by a judge of first instance and the appeal has been heard and disposed of in this Court within twenty-four hours. (1)

Solicitors: *Mayo, Elder & Co.; Roney & Co.*

(1) In consequence of this decision the following Proclamation was promulgated on September 14, 1915:—

"Whereas doubts have arisen as respects the position under the Proclamations for the time being in force relating to Trading with the Enemy of incorporated companies or bodies of persons which, though not incorporated in any enemy country or in territory in hostile occupation, carry on business in any such country or territory:

"And whereas it is expedient that the position of those companies or bodies for the purposes of those Proclamations should be defined:

"Now therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Proclamation declaring, and it is hereby declared, as follows:—

"For the purposes of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation."

G. A. S.

NEVILLE J.
1915
July 21, 22.

In re NUTT'S SETTLEMENT.
McLAUGHLIN *v.* McLAUGHLIN.

[1915 N. 473.]

Construction of Deed—Settlement to Use of Trustees and their Heirs—Trusts in favour of A. B. for Life—Remainder to the Use of her Children as she should by Deed appoint—Appointment of "trust funds and property" without Words of Limitation—Intention to be found in Document—Absolute Interest.

By a settlement land was assured to the use of trustees and their heirs upon certain trusts during the life of A. B. and after her death to the use of her children as she should by deed appoint. By a deed poll A. B. appointed that the trustees should after her death hold "the trust funds and property" in trust for her four sons in equal shares without words of limitation. At the date of the appointment some of the land had been sold and the property consisted partly of land and partly of money subject to a trust for investment in land:—

Held, (1.) that the appointees took equitable and not legal estates; (2.) that though the gift by deed of an equitable estate in land without words of limitation passes only a life estate, the fee may pass if there is to be found in the construction of the deed as a whole an intention that it should pass, and that such an intention is shown by the fact that a gift of land is coupled with a gift of money subject to a trust for investment in land which will pass absolutely without words of limitation.

In re Monckton's Settlement [1913] 2 Ch. 636 followed.

Dearberg v. *Letchford* (1895) 72 L. T. 489 not followed.

By an indenture dated December 14, 1852, Sarah Nutt appointed certain lands and real estate (after her own death) unto and to the use of two trustees, their heirs and assigns, upon the trusts therein mentioned for Anne Bromilow during her life for her separate use without power of anticipation, and from and after the death of the said Anne Bromilow to the use of all and every or such one or more children or child of the said Anne Bromilow at such age or ages for such estate or estates and if more than one in such shares and proportions and in such manner as the said Anne Bromilow should by deed or deeds appoint, and in default of such appointment and so far as any such appointment should not extend to the use of all and every the children or child of the said Anne Bromilow and the heirs of their respective bodies issuing and if more than one in equal shares.

NEVILLE J. 1915

NUTT'S SETTLEMENT, *In re.* MCLAUGHLIN *v.* MCLAUGHLIN.

The said Anne Bromilow was married to Edward McLaughlin on June 3, 1857.

By a deed poll under her hand and seal, indorsed on the said indenture, Anne McLaughlin in exercise of the power given her by the said settlement appointed that the trustees for the time being should after her decease "stand possessed of the trust funds and property" in trust for her four sons therein named in equal shares.

Certain parts of the land subject to the trusts of the settlement had been taken by the London and North Western Railway Company, and the purchase-money 3800*l.* had been paid to the trustees to be held upon the trusts of the settlement. At the date of the summons the property subject to the trusts of the settlement consisted partly of real estate and partly of this fund and other proceeds of property sold.

The said Anne McLaughlin died on October 24, 1911. All her four sons survived her, but two had died before the issue of this summons, leaving infant children who were made defendants.

This summons was taken out in May, 1915, by the trustees of the settlement for the determination of the question whether under the deed of appointment the sons of Anne McLaughlin took the land and the proceeds of sold lands absolutely or for life only.

Tyldesley Jones, for the summons.

Dighton Pollock, for the surviving sons and the representatives of the deceased sons. The first question is whether the estate appointed by Anne McLaughlin to her sons was legal or equitable. I submit that the effect of the settlement giving the land to the use of the trustees and their heirs, to the use of Anne Bromilow for life with successive uses in remainder, is that the legal estate remains in the trustees. All the successive uses are uses upon a use and therefore equivalent to trusts. Only equitable estates can be appointed to the appointees: Norton on Deeds, p. 366.

G. D. Pepys, for the infant children of the deceased sons. The limitations in the settlement of 1852 are all legal limitations of successive uses of which only the limitation to the trustees in

fee is upon trust. That trust expired with the life of Anne McLaughlin, who was the only object of it. At her death the legal limitations are continued by fresh uses to her children as she should appoint, and it is these legal uses which are appointed to her sons by the deed poll. They therefore took legal estates in tail which vested on their death in their children.

NEVILLE J. I think Mr. Pollock is right upon this point. I must hold that the legal estate remained in the trustees and only equitable estates passed by the appointment.

Dighton Pollock, for the surviving sons and the representatives of the deceased sons. In a gift by deed, whether by appointment or otherwise, of an equitable estate the fee will pass without words of limitation if there is upon the face of the deed a sufficient indication of an intention on the part of the settlor or donor that an absolute interest should pass: *In re Tringham's Trusts* (1); *In re Oliver's Settlement* (2); *In re Thursby's Settlement.* (3)

In *Pugh* v. *Drew* (4) a sufficient indication of intention was found in the fact that there was a gift of leaseholds in trust for A. and B. in equal shares and then a gift of freeholds upon the same trusts. Here we have a gift of the funds and property. As the funds must pass absolutely the land also will pass for an estate in fee.

In re Monckton's Settlement (5) shows that the word heirs is not required to pass an absolute interest in money subject to a trust for investment in land.

G. D. Pepys, for the infant defendants. I do not dispute that an equitable estate in fee may pass under a gift without words of limitation if there is sufficient indication in the deed of an intention that it should pass. But there is no such intention shown here.

In *Holliday* v. *Overton* (6) and *Lucas* v. *Brandreth* (No. 2) (7)

(1) [1904] 2 Ch. 487.
(2) [1905] 1 Ch. 191.
(3) [1910] 2 Ch. 181.
(4) (1869) 17 W. R. 988.
(5) [1913] 2 Ch. 636
(6) (1852) 15 Beav. 480.
(7) (1860) 28 Beav. 274.

NEVILLE J. there were gifts as here to trustees and their heirs and assigns, in trust for certain persons, and it was held that the rule that the estate of the cestuis que trust is commensurate with that given to the trustees is inapplicable to limitations in a deed. In *Pugh* v. *Drew* (1) the gift was by reference to a gift of personalty which was complete without words of limitation; there is no such reference here. *Dearberg* v. *Letchford* (2) and *In re Hudson* (3) show that the mere fact that the gift is one of a mixed fund of real and personal estate is not enough to make an absolute interest pass without words of limitation. *In re Tringham's Trusts* (4) is distinguishable because there was a gift over in default of issue of the donees which was held to be clear evidence of an intention that the donees should take the fee. In *In re Irwin* (5) Buckley J. (as he then was) went through all the cases and deduced from them a rule that the equitable fee could only pass without words of limitation in three classes of cases, none of which apply here. *In re Thursby's Settlement* (6) is in my favour and appears to be the only case where the question has arisen on the exercise of a power of appointment. *In re Monckton's Settlement* (7) was a case in which the question was what estate passed to trustees. *In re Tringham's Trusts* (4) was distinguished, and it was held that the trustees took real estate for life only, but that they took an absolute interest in moneys directed to be invested in land.

1915

NUTT'S SETTLEMENT, *In re.*

MCLAUGHLIN *v.* MCLAUGHLIN.

NEVILLE J. The point to which I think I ought to direct my attention is as to the terms of the appointment in the present case, and they are as follows: Under the power Anne Bromilow appoints "that the trustee or trustees for the time being do and shall from and after the decease of the appointor stand possessed of the trust fund and property in trust for" her sons, and then she names the sons, "in equal shares." It is to be observed she speaks of "the trust fund and property."

The facts were that the property was a settled property in which

(1) 17 W. R. 988.
(2) 72 L. T. 489.
(3) (1895) 72 L. T. 892.
(4) [1904] 2 Ch. 487.
(5) [1904] 2 Ch. 752.
(6) [1910] 2 Ch. 181.
(7) [1913] 2 Ch. 636.

there was a power of sale and that the greater proportion at all events of the property had been then sold and was represented by money or funds. It seems to me if I can find out what the effect of the appointment would have upon the part of the property mentioned I have some guide by which I may ascertain what was intended with regard to the rest, because the trust fund and property are treated as one and the same and devoted, as it seems to me, to the same destination. First with regard to the moneys or funds which represent the sale of the real estate; with one exception I can find no authority in which it has been held that in order to pass an absolute interest in money—whether it is the proceeds of sale of real estate or not, whether it is devoted to the repurchase of real estate or not—where there is a life interest, words of limitation are necessary. I should be very loth to carry the doctrine of notional conversion in equity to such an extreme length. It is said, and I think truly, that *Dearberg* v. *Letchford* (1) is an authority to that effect. *In re Monckton's Settlement* (2) seems to me to be an authority the other way. It is pointed out with regard to *In re Monckton's Settlement* (2) that the moneys were to be held as capital moneys under the Settled Land Act, and consequently there was no absolute trust to invest them in land, there might be an investment in Government securities. If that distinction is a good distinction my own decision is not completely covered by it, but if the two judgments are to be compared I express my preference for the decision in *In re Monckton's Settlement.* (2) It seems to me when one has arrived at the conclusion with regard to the money considerable light is thrown upon the proper construction to be put upon the whole appointment. I do not propose to go through all the cases bearing upon the point, because they have been reviewed in several cases lately, but the outcome of them, in my opinion, is this, that with regard to the granting of equitable estates a grant of land upon trust for A. passes to A., if there is nothing more, only a life estate; but words of limitation with regard to an equitable estate are not, in my opinion, indispensable, because I think that what estate is given to a beneficiary depends upon the construction of the document purporting to give him the

(1) 72 L. T. 489. (2) [1913] 2 Ch. 636.

NEVILLE J.

1915

NUTT'S SETTLEMENT, *In re.*

MCLAUGHLIN *v.* MCLAUGHLIN.

benefit and must be determined by the whole of the deed or document which has to be interpreted. I think, therefore, that if you can find in the documents themselves, or in the document itself that you have to examine, a sufficient indication of a desire to pass not a life estate, but an equitable estate in fee, that intention must prevail.

Now there is one case which appears to throw some doubt upon that proposition, and that is the decision of Buckley J. in *In re Irwin* (1), in which he appears at first sight to have come to an opposite conclusion, but I am not at all sure that he did in principle. He says the conclusion he arrives at is in conflict with his own opinion, but he considers himself bound by the authorities. I am not convinced that he did not think that in the case before him there was no sufficient indication of intention contained in the deed to enable him to say that, in spite of the absence of words of limitation, it was intended that the equitable fee should pass. However that may be, that case has been since considered and distinguished on the ground that there the question was what estate the trustee took and not what estate was given to the beneficiary. Speaking for myself I think it undesirable to raise a distinction between the two cases. I think that in the construction of deeds dealing with equitable estates the Court should put such a construction upon the covenant or grant as may be consistent with the intention expressed in the whole deed.

When I come to this deed I think I should be deliberately hiding from myself the intention of the appointor if I did not take into consideration the context to the gift of the land. The land is of course more popularly described as property than as trust funds, and we may assume that the word "property" was intended to deal with the land, but it is clear to my mind that the appointor desired a full and complete interest both in the trust fund and in the property to pass in equal shares to the sons she has named. It would be doing injustice to the words used if one were to read those words as meaning the trust funds are to go in equal shares amongst her sons, but the property is only to go to them as tenants in common for life. I do not think anybody

(1) [1904] 2 Ch. 752.

fairly reading this document could come to the conclusion that that was the intention of the appointor. I am of opinion, therefore, that the named sons take both the trust fund and the unsold real estate in equal shares absolutely.

Solicitors: *Sharpe, Pritchard & Co., for W. C. Cripps, Son & Daish, Tunbridge Wells.*

J. R. B.

In re ROGERS.

PUBLIC TRUSTEE *v.* ROGERS.

[1915 R. 697.]

Will—Tenant for Life and Remainderman—Rule in Howe *v.* Earl of Dartmouth (1)*—Powers to convert, postpone Conversion, and invest all subject to Consent of Tenant for Life—Unauthorized Investments held at Testator's Death—Right of Tenant for Life to Income in Specie.*

R. by will gave all his residuary estate to the Public Trustee upon trust, with the consent of his wife, to sell and convert, with power, with the like consent, to postpone sale and conversion for such time as he should think fit, and to hold the proceeds upon trust, with such consent as aforesaid, to invest the same upon specified investments and to pay the income to his wife during her life.

The testator's estate comprised investments not authorized by his will, which produced a larger income than 4 per cent.:—

Held, that as both conversion and postponement of conversion were subject to the wife's consent, her position was the same as if conversion was postponed by the will until after her death, and she was entitled to the income in specie.

THE testator in this matter by his will, dated June 16, 1913, after making certain specific bequests in favour of his wife and nieces, gave all the residue of his estate to the Public Trustee, "Upon trust that he shall with the consent of my said wife sell call in and convert into money any real estate and such parts of my personal estate as shall not consist of money in such manner as he may think fit with full power to postpone with such consent as aforesaid for such period as he may consider advisable the sale or conversion of all or any part of my said real and

(1) (1802) 7 Ves. 137 a.

NEVILLE J. 1915 ROGERS, *In re.* PUBLIC TRUSTEE *v.* ROGERS.

personal estate" and after payment of debts and funeral and testamentary expenses should stand possessed of the residue of the proceeds of such sale and conversion "upon trust to invest the same with such consent as aforesaid" as therein mentioned, "and to pay the annual income thereof and of the said investments (hereinafter called the trust fund) to my said wife during her life and after her death" upon the trusts therein mentioned.

The testator died on October 4, 1914, leaving personal estate only. The estate consisted in part of investments not authorized by the will and producing income at a higher rate than 4 per cent.

This summons was taken out by the Public Trustee for the determination of the question whether the widow was entitled to the income of the whole fund in specie until conversion or only to so much thereof as was equal to 4 per cent. on the capital.

C. S. Crossman, for the summons.

Baden Fuller, for the tenant for life. In this case the sale and conversion or the postponement of conversion can only take place with the consent of the tenant for life, and, therefore, there is no obligation on the trustee to sell. It is decided that an optional power of sale given to a tenant for life gives her the right to enjoy the income in specie: *In re Pitcairn* (1); *In re Bentham* (2)

The case is within the rule laid down in the cases where the trust for sale arises after the estate for life: *Alcock* v. *Sloper* (3); *King-Sampson* v. *King-Sampson*. (4)

C. E. Bovill, for the remainderman. The will does not postpone the sale till after the death of the tenant for life. The power of consent cannot be absolute, it can only be for the purpose of the administration of the estate, for the like consent is required for investment, and if the widow had an absolute power to refuse her consent to any investment it would make it impossible for the trustee to carry out the trusts.

(1) [1896] 2 Ch. 199.
(2) (1906) 94 L. T. 307.
(3) (1833) 2 My. & K. 699.
(4) [1866] W. N. 78.

NEVILLE J. In this case I am of opinion that the wife is entitled to the whole income in specie. The trust for sale and conversion and the power to postpone can only be exercised with her consent, and it is, therefore, the same thing as if the trusts were to retain the investments until the wife exercised a power of conversion. It has been argued that the power to invest is also only with the like consent, and this shows that her power of consent cannot in either case be intended to be absolute, as if it were so in the case of investment she could entirely prevent the trustee from carrying out the trust by refusing to consent to any investment of the trust fund. I am of opinion, however, that her power to withhold her consent is absolute even in the case of investment. If she refused her consent to any form of investment it would deprive her of all income, but she would be the only sufferer, and if she liked so to exercise her power against her own interests she could do it.

NEVILLE J. 1915 ROGERS, *In re.* PUBLIC TRUSTEE *v.* ROGERS.

Solicitors: *Ralph Leach & Co.*

J. R. B.

In re J. A. NORDBERG, LIMITED.

NEVILLE J. 1915 *July* 27, 29.

[00212 of 1915.]

Company—Scheme of Arrangement—Alteration of Memorandum of Association—Altering Rights of Preference Shareholders—Alterations not involving Consolidation of Shares of different Classes or Division of Shares into different Classes—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

A scheme of arrangement which modifies the memorandum of association of a company in any way other than those specified in s. 45 of the Companies (Consolidation) Act, 1908, does not require a special resolution passed by the majority mentioned in that section, but may be validly effected under s. 120 of that Act.

THIS was a petition presented for the sanction of the Court to a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908.

The memorandum of association provided that the capital of the company should consist of 5000*l.* divided into 3000 preference

NEVILLE J. 1915 J. A. NORDBERG, LIMITED, *In re.*

and 2000 ordinary shares of 1*l.* each; and that the profits of the company in each year should be applied first in payment of a fixed cumulative preferential dividend of 7 per cent. per annum on the capital for the time being paid up on the preference shares, and that the remaining profits should be divided as to one-third between the holders of the preference shares and as to two-thirds between the holders of the ordinary shares; and that in a winding-up the assets available for distribution among the members should be applied in payment (*a*) of the capital paid up on the preference shares with any arrears of dividend thereon whether declared or not up to the commencement of the winding-up; (*b*) of the capital credited as paid up on the ordinary shares: (*c*) the balance to be distributed as to 25 per cent. among the preference shareholders, and as to 75 per cent. among the ordinary shareholders.

The scheme of arrangement varied the memorandum by giving the ordinary shareholders the whole balance of the profits after paying the cumulative 7 per cent. dividend to the preference shareholders, and in a winding-up the whole of the distributable assets after payment of the capital and arrears of dividend upon the preference shares and the capital of the ordinary shares.

The petition asked that the Court would direct meetings to be held under s. 120 and sanction the arrangement.

Separate meetings were directed and held of the preference and ordinary shareholders, and at each meeting the whole of the shareholders were present, and the resolutions were carried unanimously. The petition now came on for the sanction of the Court.

Frank Evans, for the petition. The scheme of arrangement, confirmation of which is asked for, does involve a modification of the memorandum of association, because it alters the rights as to dividends by the memorandum given to preference shareholders. It raises therefore the question, which has given rise to discussion, whether the procedure prescribed by s. 45 must be followed in every case where the memorandum is modified, or only where the memorandum is modified in the special ways mentioned in that section. It is submitted that *In re Palace*

Hotel (1) is a clear authority that s. 45 only applies to the two cases specially mentioned therein, and the Court of Appeal affirmed that decision in *In re Schweppes*. (2)

[NEVILLE J. The Court of Appeal held in that case that the scheme did not alter the memorandum. It is no authority on this point.]

The words of s. 120 are quite general and there is nothing to limit them unless s. 45 applies to every alteration of the memorandum.

Cur. adv. vult.

July 29. NEVILLE J. The arrangement I am asked to sanction diminishes the right of preference shareholders to dividends conferred upon them by the memorandum of association. The question is whether that is an "arrangement" within s. 120 of the Companies (Consolidation) Act, 1908, capable of being confirmed by the Court.

In my opinion it alters the memorandum of association. If s. 120 includes such an arrangement it must include all alterations of the memorandum with regard to capital which do not come under s. 45, that is to say, which do not involve consolidation of shares of different classes or the division of shares into shares of different classes. In other words s. 45 is not an enabling section as its form would suggest, but a section limiting the generality of the power under s. 120 to make arrangements with regard to capital which alter the terms of the memorandum of association.

I think that, as Mr. Evans argued, this was in fact held in *In re Palace Hotel* (1), and the same view was I think expressed by Cozens-Hardy M.R. in *In re Schweppes* (3), although he did not consider the decision of that point necessary for the decision of the case before him.

As I understand the authorities you can under s. 120 alter the rights conferred by the memorandum upon preference shareholders, provided that in so doing you avoid consolidating shares of different classes or dividing shares into shares of different classes.

(1) [1912] 2 Ch. 438. (2) [1914] 1 Ch. 322.
(3) [1914] 1 Ch. 330.

NEVILLE J. 1915 J. A. NORDBERG, LIMITED, *In re.*

In the two cases mentioned in s. 45 I think a special resolution as defined by that section, confirmed by an order of Court, will still be required. If this were not so and an arrangement under s. 120, although dealing with the matters provided for by s. 45, did not require the resolutions provided for by that section, s. 45 would it seems to me be a meaningless excrescence on the Act.

I sanction the arrangement, following the decision in *In re Palace Hotel.* (1)

Solicitors: *Munns & Longden.*

J. R. B.

C. A. 1915 *Oct.* 18.

In re PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED.

[0061 of 1915.]

Company — Winding-up — Insolvent Shareholder indebted to Company — Executors' Right to share in Surplus Assets subject to setting off the Dividend only on the Debt.

A company incorporated under the Companies Acts, 1862 to 1900, and whose articles of association did not give it any lien on its fully-paid shares for the debt of the holder thereof, went into voluntary winding up on July 15, 1914. Fully-paid shares in the company formed part of the estate of A., who died in 1908, insolvent. A judgment for administration in an action by a creditor of the testator was made in 1909, and the Master by his certificate found the company to be a creditor for 2633*l.*, in which A. had become a debtor to the company. In the winding-up there were surplus assets distributable among the fully-paid shareholders of the company. The liquidator conceded that there was no set-off within the language of the Statute of Set-off, and that the case was not one of mutual dealings so as to raise any question of set-off under s. 38 of the Bankruptcy Act, 1883; but he contended that the case was within the broader principle—enunciated in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442, and given effect to in *In re Akerman* [1891] 3 Ch. 212, and a series of subsequent cases—that where a person entitled to participate in a fund was also bound to make a contribution in aid of that fund, he could not be allowed to participate unless and until he had fulfilled his duty to contribute; and that the

(1) [1912] 2 Ch. 438.

executors of A. were bound to pay the liquidator the full amount of the 2633*l.* as a term of receiving a share in the company's surplus assets :—

Held, affirming the decision of Sargant J., ante, p. 144, that the liquidator was not entitled to retain the testator's share in surplus assets against more than the proper dividend on the ascertained debt.

C. A. 1915

PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

APPEAL from a decision of Sargant J. (1)

The Peruvian Railway Construction Company, Limited, was incorporated in the year 1906 under the Companies Acts, 1862 to 1900, and went into voluntary liquidation under a special resolution for that purpose passed on June 29, 1914, and confirmed on July 15, 1914. A large number of fully-paid shares in the company formed part of the estate of William John Alt, deceased (below called "the testator"), who died on November 9, 1908, insolvent and indebted to the company to a considerable amount. The articles of association of the company did not give any lien on its fully-paid shares for the debts of the member holding the same.

Shortly after the testator's death a creditors' action was brought for the administration of his estate, and a decree for administration was made on March 1, 1909. Further, by the Master's certificate, dated December 12, 1913, the company was found to be a creditor of the testator for a sum (including costs) of 2633*l.* 10*s.* 7*d.* (below referred to as "the ascertained debt"). Subsequently, however, to the liquidation of the company, and when there was reason to think that a considerable return might be made on the testator's share capital in the company, the liquidator applied for and obtained an order in the administration action to vary the Master's certificate by striking out his name as a creditor in respect of the ascertained debt, in order that he might be enabled to set up a claim to deduct the ascertained debt from the amount which would be coming to the estate of the testator from its holding in the share capital of the company.

An originating summons in the winding-up was taken out by the executors of the testator, seeking a declaration that the liquidator was not entitled to set off against the share of the applicants in the surplus assets of the company any sum due or

(1) Ante, p. 144.

C. A. 1915

PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

claimed to be due from the testator or his estate to the company other than a sum of 473*l.* which had been paid by the company to the applicants, and formed no part of the ascertained debt, and stood on an entirely different footing. The language of the summons was quite general, and the only sum to which it in fact applied was the ascertained debt.

The summons was adjourned into Court.

Sargant J. held that the liquidator was not entitled to retain Alt's share in the surplus assets against more than the proper dividend on the ascertained debt.

The liquidator appealed.

F. Whinney (with him *Gore-Browne, K.C.*), for the appellant. The rule stated in *Cherry* v. *Boultbee* (1) that a person who is entitled to participate in a fund and is also under a liability to contribute to it cannot participate till he has contributed is sound and should be followed, but the application of it in that case does not extend to a company in liquidation. It is true that the rule was followed in *In re Hodgson* (2) and *In re Orpen* (3), but those were both cases on wills. The position of the company must be considered. The liquidator has to adjust the rights of the shareholders on the footing of equality: s. 186 of the Companies (Consolidation) Act, 1908. He cannot accept dividends on the debt instead of payment in full, for that would be to prefer the executors to the other shareholders. The result may be to prefer the company to the other creditors of Alt's estate, but that is the result of the mutual dealings. At the date of the liquidation the debt was due and it has not been discharged: *In re Leeds and Hanley Theatres of Varieties.* (4) The principle is wider than anything involved in set-off: *In re Rhodesia Goldfields* (5); *In re West Coast Gold Fields.* (6) The rights of the contributories to the company must be adjusted before they receive anything. The question is what is the distributable capital of the trust estate.

(1) 4 My. & Cr. 442.
(2) (1878) 9 Ch. D. 673.
(3) (1880) 16 Ch. D. 202.
(4) [1904] 2 Ch. 45.
(5) [1910] 1 Ch. 239.
(6) [1905] 1 Ch. 597; [1906] 1 Ch. 1.

Hon. Frank Russell, K.C., and *Percy F. Wheeler*, for the executors of Alt, were not called upon to argue.

LORD COZENS-HARDY M.R. This is an appeal from a judgment of Sargant J. arising out of facts which can be stated very shortly. Mr. William John Alt was a man who was largely indebted to the Peruvian Railway Construction Company: he died in 1908: his estate was insolvent: it has been administered in Court, the decree for administration being made in March, 1909. No creditor could maintain an action against the executors in respect of the debt because of the decree for administration. The company put in a claim against the estate for the amount of the debt, and that claim was admitted; whether the whole claim was admitted or not I do not know, but at any rate there was an admitted claim against the estate, and that claim has since been expunged on an application to vary the certificate; and it was arranged that it should be done without prejudice to the rights of the executors.

Then what happened? The company, six years after the debt and five years after the decree for administration, was wound up. It was wound up in 1914. Assets came in rather unexpectedly, I suppose, to the company, and the result is that after satisfying all the debts of the company there is a surplus of assets in the hands of the liquidator. The liquidator now says: You owe me the amount of this debt for which I formerly proved; I owe you a share in respect of the surplus assets; your estate was a very large shareholder; it is true that the shares were all fully paid up; it is true that under the articles of association there is no lien given to the company in respect of these fully paid up shares; but nevertheless I claim that by virtue of this transaction in 1914 I am entitled to say, "Pay me the total amount of your testator's debt before I give you one penny in respect of the surplus assets of the company." In my opinion that is not well founded. Having regard to the date of the debt and the decree for administration and the provisions of the articles of association of the company, the rights of the parties must be considered at that time. I cannot conceive that an entirely new right not known to the parties or to the law at that time can have the

C. A. 1915

PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED, *In re.*

effect of giving to this particular creditor, namely, the company, a more advantageous position than to any other creditor.

That seems to be the short point in this case. I think the judgment of the learned judge was quite right and that this appeal should be dismissed.

BANKES L.J. I agree. Sargant J. stated correctly, according to Mr. Whinney, the principle for which he is contending, and the only question is whether it is applicable to the particular facts of this case. Sargant J. referred to *Cherry* v. *Boultbee* (1), and after referring to it and reading an extract from the judgment of the Lord Chancellor, this is what he said (2): "In the present case the executors of the testator stand in precisely the same position as the assignee of the bankrupt debtor, and the company in the same position as the executors of the testatrix." If that is correct, *Cherry* v. *Boultbee* (1) applies to this case. In my opinion it is correct. I cannot see any distinction between the two cases or any ground for quarrelling with the view there expressed by the learned judge. In my opinion he was quite right and this appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. At the time the rights of the liquidator arose, which at the earliest was the date of the liquidation of the company, all that he was entitled to receive from the executors of the deceased shareholder were such sums as the Court in the administration had ordered or might order to be paid by way of dividend. In my opinion that brings the present case exactly within the principle of *Cherry* v. *Boultbee* (1) and the decision of the Lord Chancellor in that case. I do not see the distinction. Therefore, I agree that the appeal should be dismissed.

Solicitors: *Francis Voules & Co.; Badham, Comins & Sloman.*

(1) 4 My. & Cr. 442. (2) Ante, p. 152.

H. C. R.

In re BOWMAN.

SECULAR SOCIETY, LIMITED *v.* BOWMAN.

[1914 B. 3872.]

C. A.
1915
JOYCE J.
April 15.
C. A.
July 13, 15, 30.

Will—Legacy to Corporation—Secular Society, Limited—Objects of Company—Subversive of Religion—Blasphemy—Public Policy—Validity of Gift—Blasphemy Act, 1697 (9 *Will.* 3, *c.* 35).

A testator gave his real and personal estate upon trust, after the death of his wife, for sale and conversion, and then, subject to the payment of certain legacies and the provision for certain annuities out of the proceeds of such sale and conversion, "upon trust for the Secular Society, Limited."

The Secular Society, Limited, was a company limited by guarantee and registered under the Companies Acts. The main objects of the company, as stated in its memorandum, were, inter alia, (*a*) "to promote . . . . the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."

The articles of association provided that all moneys received by the society should be applied solely in carrying out its objects, and that no portion of its income should be paid by way of dividend, bonus, or otherwise by way of profit to any member, and that upon the winding up or dissolution of the society the surplus assets should not be paid or distributed among the members, but should be given to some other kindred society or non-sectarian charity:—

Held, that there was nothing necessarily illegal in the objects of the society as stated in the memorandum of association. They might be given effect to without incurring liability to indictment for blasphemy either under the Blasphemy Act or at common law, and they were not of such a character as that the Court was bound to refuse to aid the society in its claim to the legacy. No question of perpetuity arose, and the gift was consequently valid.

Per Warrington L.J.: A gift cannot properly be held invalid on the ground that it is given for a purpose which may be contrary to ecclesiastical law but is not otherwise illegal.

Decision of Joyce J. affirmed.

Briggs v. *Hartley* (1850) 19 L. J. (Ch.) 416 and *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230 overruled.

ADJOURNED SUMMONS.

Charles Bowman by his will, dated September 14, 1905, after appointing his widow and George Warren to be executors and trustees thereof, devised and bequeathed all his real and

C. A. 1915 BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

personal estate not therein otherwise disposed of to his trustees upon trust after the death of his wife for sale and conversion and then subject to the payment of certain legacies to his grandchildren and the provision for certain annuities out of the proceeds of such sale and conversion "upon trust for the Secular Society, Limited, of 2, Newcastle Street, Farringdon Street, London"; and he directed that the receipt of two of the directors of the said society countersigned by the secretary for the time being should be a sufficient discharge to his trustees. By a codicil dated February 28, 1908, he revoked the appointment of George Warren as executor and trustee and appointed C. J. Bowman and A. G. Stanzick to be executors and trustees of his will in the place of the said Warren.

The testator died on April 21, 1908, and his will and codicil were proved on May 19, 1908.

The testator's widow died on October 18, 1914.

The testator's grandchildren having given notice that they intended to dispute the validity of the gift to the Secular Society, Limited, the plaintiffs took out an originating summons for the determination of the question whether the said gift was good and valid or not.

The Secular Society, Limited, was a company registered under the Companies Acts, limited by guarantee. Its objects as stated in the memorandum of association were as follows:—

"(*a*) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action. (*b*) To promote the utmost freedom of inquiry and the publication of its discoveries. (*c*) To promote the secularisation of the State so that religious tests and observances may be banished from the Legislature, the Executive and the Judiciary. (*d*) To promote the abolition of all support, patronage or favour by the State of any particular form or forms of religion. (*e*) To promote universal secular education without any religious teaching in public schools maintained in any way by municipal rates or imperial taxation. (*f*) To promote an alteration in the laws concerning religion so that all forms of opinion may have the

same legal right of propaganda and endowment. (*g*) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens. (*h*) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances or religious ideas. (*j*) To employ lecturers, writers, organisers or other servants for the same end. (*k*) To publish books, pamphlets or periodicals. (*l*) To assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting any of the above objects. (*m*) To have, hold, receive and retain any sums of money paid, given, devised or bequeathed by any person and to employ the same for any of the purposes of the society. (*n*) To co-operate or communicate with any kindred society in any part of the world. (*o*) To do all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects."

The articles of association provided (inter alia) as follows :—

"Article 54. All monies received on account of entrance fees, subscriptions, donations, bequests, or otherwise shall be applied solely in carrying out the objects of the society, and in payment of just debts and expenses of management.

"55. No portion of the income of the society, from whatever source derived, shall be paid, or transferred directly or indirectly by way of dividend or bonus or otherwise howsoever by way of profit, to the persons who at any time are, or have been, members of the society, or to any of them, provided that nothing herein contained shall prevent the payment of remuneration to any officers or servants of the society, or other person in return for any services actually rendered to the society.

"56. The society shall not be wound up or dissolved except with the consent of at least nine tenths of its members, to be expressed by a resolution at a general meeting specially called for that purpose.

"57. If upon the winding up or dissolution of the society there remains, after the satisfaction of all its debts and liabilities, any property, the same shall not be paid to or distributed amongst

C. A. 1915 BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

the members, but shall be given or transferred to or between such other kindred society or societies, or to or between such other non-sectarian charity as may be designated by the resolution for winding up, or, in the absence of such designation, as the liquidators may select."

Certain documents issued by the officers of the society were tendered in evidence on behalf of the defendants to show that the limited company was a mere screen for the National Secular Society, against the leaders of which numerous prosecutions for blasphemy had in the past been undertaken by the Government of the day. A book issued by the society in which the Bible was held up to ridicule was also tendered. This evidence was, however, rejected by the learned judge.

The adjourned summons was heard by Joyce J. on April 15, 1915.

Tomlin, K.C., and *Hon. M. M. Macnaghten*, for the society.

Hughes, K.C., and *L. W. Byrne*, for the trustees.

Cave, K.C., and *J. Arthur Price*, for the heir-at-law and next of kin.

JOYCE J. It will hardly be necessary to say so, but personally I have not the smallest sympathy with the objects of the society which Mr. Tomlin represents on this occasion, still less with the manner in which they have proceeded; but still, this is a case to be decided according to law and according to law only. The testator has given a legacy to a company which is governed by a memorandum and articles of association. In the memorandum and articles it is in effect prescribed how the moneys given to the company are to be expended, and they can be expended for nothing else. It practically comes to this: it is a legacy to the society to be expended upon trust in carrying out the objects of the society according to its prescribed rules. Notwithstanding the argument addressed to me by Mr. Cave, I do not find in this memorandum or in the articles anything subversive of morality or contrary to law or contravening the provisions of any statute. I may be wrong, but that is my opinion.

If that be so, then this legacy is a perfectly good legacy unless

it can be made out that having regard to the constitution of this society the rule against perpetuities is infringed by the bequest of this legacy. If the memorandum or articles had prescribed that money received in this way should be invested and kept as capital and only the income applied to the purposes of this society, then one would have been compelled, I think, to have considered the question whether the objects were charitable, because if they were not charitable then a perpetuity would be created by the trust, and that trust would have been bad unless charitable; but I do not find in these articles anything creating a perpetuity with regard to the money coming to the society by legacies or gifts or anything of the kind. The mere fact that on a winding-up the money is not to be divided among the members, if that article be valid, does not create a perpetuity. If it did I am not sure that that article would not have been void, but I do not think it does.

It appears to me that there is nothing to invalidate or take away or destroy the validity of this gift to the society, and I think the gift is good.

From this decision the next of kin and heir-at-law of the testator appealed. The appeal came on for hearing on July 13, 1915.

C. A.

Cave, K.C., and *J. Arthur Price*, for the appellants. The Secular Society, Limited, was formed for the express purpose of collecting money and giving it to the National Secular Society, which is an unincorporated society with objects which are clearly illegal. Documentary evidence to this effect was tendered in the Court below, but was objected to, and the judge upheld the objection. We now ask that the evidence should be admitted. [By consent the documents in question were put in and read de bene esse.] If an illegal society forms a company with the object of getting subscriptions for itself all the circumstances can be inquired into. The Secular Society, Limited, is a sham society with objects which are illegal and against public policy. Registration of the company under s. 17 of the Companies (Consolidation) Act, 1908, has the effect of making it a legal organization, but it does

C. A. 1915

BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

not legalize all its objects: *British Association of Glass Bottle Manufacturers* v. *Nettlefold.* (1) Gifts to the National Secular Society are clearly invalid and they cannot be validated by being given to an intermediary in the first instance. The objects of the society are illegal: *In re Duty on Estate of Institution of Civil Engineers.* (2) Its main object is the subversion of religion; its whole purpose is an attack upon religion; and gifts for that purpose are void. Its objects being subversive of all religion, they will not be assisted by the Court—*Lady Egerton's Case*, referred to in Duke on Charitable Uses, p. 127—although they may not be subjects for indictment: *De Costa* v. *De Paz.* (3) The offence of apostasy was at one time punishable by death, and was amenable to the same procedure as heresy, but the writ de haeretico comburendo was abolished by the Act 29 Car. 2, c. 9. Ecclesiastical jurisdiction was, however, preserved. The Ecclesiastical Courts still have power to spiritually censure persons not members of a dissenting religious body for not going to church, as was recognized in *Taylor* v. *Timson.* (4) See also *Upfill* v. *Wright.* (5) By the Toleration Act, 1688, and subsequent statutes the disabilities of Christian dissentients from the established religion were removed, but by none of them was atheism legalized. See 1 W. & M. c. 18; 34 & 35 Vict. c. 48; 53 Geo. 3, c. 160. But the common law as to blasphemy was not thereby altered: *Rex* v. *Waddington.* (6) In *Harrison* v. *Evans* (7) Lord Mansfield said: "The eternal principles of natural religion are part of the common law: the essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law" . . . . "The common law of England, which is only common reason or

(1) (1911) 27 Times L. R. 527.

(2) (1888) 20 Q. B. D. 621, 629; sub nom. *Commissioners of Inland Revenue* v. *Forrest* (1890) 15 App. Cas. 334.

(3) (1754) 2 Swans. 487, n.; Amb. 228.

(4) (1888) 20 Q. B. D. 671.

(5) [1911] 1 K. B. 506.

(6) (1822) 1 B. & C. 26.

(7) The judgment in this case is to be found in "A Sketch of the History and Proceedings of the Delegates appointed to protect the Civil Rights of the Protestant Dissenters," (1813) p. 31; and also in the Appendix to Dr. Philip Furneaux's Letters to Mr. Justice Blackstone (2nd ed.).

usage, knows of no prosecution for mere opinions: For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished under the common law; but bare nonconformity is no sin by the common law."

Prior to the Act which tolerated Unitarianism it was held that a bequest for promoting Unitarianism was void: *Shore* v. *Wilson*. (1) Lord Lyndhurst there said that Lady Hewley could not have intended to include a benefit to Unitarianism, which was an unlawful object. That was a decision and not mere dictum, and is conclusive of this case because the position of Unitarianism at that time was exactly the same as that of atheism to-day.

A gift for objects some of which are illegal, leaving it to the discretion of the donee to benefit those which are illegal or not, is unquestionably bad. The basis of the Christian religion is that people must be guided in their conduct by their belief. Religion does not stop at theory but involves practice. To attack that principle is to subvert religion. The profession of atheism may be harmless, but what is advocated by this society is applied atheism. To teach people that they are not to be guided by their faith and are not to believe in the existence of another world is entirely subversive of religion.

In *Lawrence* v. *Smith* (2) Lord Eldon expressed a doubt whether an injunction could be granted to restrain an infringement of the copyright of a book which seemed to impugn the immortality of the soul on the ground that the law did not give protection to those who contradict the Scriptures. See also *Murray* v. *Benbow*, where Lord Eldon refused to grant an injunction to restrain the piracy of Lord Byron's drama, Cain. (3)

In *Cowan* v. *Milbourn* (4) it was held that to advocate principles which are contrary to religion and Christianity is unlawful whether indictable or not. If that decision is correct it covers this case. Under the Blasphemy Act, 1697 (9 Will. 3, c. 35), penalties are still imposed upon persons who having

(1) (1842) 9 Cl. & F. 355, 396.
(2) (1822) Jac. 471.
(3) (1822) Byron's Works, ed. 1837, p. 317; Jac. 474, n.
(4) L. R. 2 Ex. 230.

C. A. 1915

BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

been educated in or at any time having made profession of the Christian religion shall by writing, printing, teaching, or advised speaking deny the Christian religion to be true or the Holy Scriptures to be of Divine authority; and apart from that Act there have been numerous prosecutions for blasphemous libel: *Reg.* v. *Bradlaugh* (1); *Reg.* v. *Ramsay* (2); *Pankhurst* v. *Thompson* (3); *Rex* v. *Boulter.* (4) But whether it be the subject of indictment or not, the propagation of doctrines subversive of all religion is so much against public policy that it is illegal. No protection has ever been extended to atheism by any statute.

The book, put in evidence, which is published by the society is, on any view of the law, blasphemous, and its publication comes within the line of conduct referred to in Starkie's Law of Libel, 3rd ed. p. 6. Contracts which are founded upon immorality and contrary to public policy cannot be enforced, although the contractors may not be liable to punishment: *Pearce* v. *Brooks* (5); *Smith* v. *White* (6); *Upfill* v. *Wright.* (7)

Trusts adverse to the foundation of all religion and subversive of all morality are void and the Court will not enforce them: Lewin on Trusts, 12th ed. p. 120; *Thornton* v. *Howe.* (8) This bequest is in the nature of a trust. Bequests inconsistent with Christianity are void: *Briggs* v. *Hartley* (9); *Thompson* v. *Thompson.* (10) A gift to propagate the Jewish religion would have been void under the old law before the disabilities of the Jews were removed: *De Costa* v. *De Paz.* (11) In *In re Besant* (12) the custody of a child was refused to its mother on the ground that it would be against the child's interest not to be taught religion. In *Cary* v. *Abbot* (13) a bequest for the purpose of bringing up children in the Roman Catholic faith was held void. That was, of course, before the removal of the disabilities of Roman Catholics. See also *De Themmines* v. *De Bonneval.* (14)

(1) (1883) 15 Cox, C. C. 217.
(2) (1883) 15 Cox, C. C. 231.
(3) (1886) 3 Times L. R. 199.
(4) (1908) 72 J. P. 188.
(5) (1866) L. R. 1 Ex. 213.
(6) (1866) L. R. 1 Eq. 626.
(7) [1911] 1 K. B. 506.
(8) (1862) 31 Beav. 14.
(9) 19 L. J. (Ch.) 416.
(10) (1844) 1 Coll. 395.
(11) 2 Swans. 487, n.; Amb. 228.
(12) (1879) 11 Ch. D. 508, 513.
(13) (1802) 7 Ves. 490.
(14) (1828) 5 Russ. 288.

Jews and Roman Catholics have now been taken out of the law, but atheists have never been.

[LORD COZENS-HARDY M.R. referred to *Straus* v. *Goldsmid.* (1)]

That case has been criticized in Tyssen on Charitable Bequests, p. 50.

[WARRINGTON L.J. referred to *In re Michel's Trust.* (2)]

That case was after the Act 9 & 10 Vict. c. 59, which legalized Jewish charities, and the question there was whether the statute was retrospective or not.

That being the policy of the law, can it be said that this society is one to which a valid bequest can be made? It is against all authority to hold that a bequest for a purpose which is illegal, against public policy, and tends to immorality is valid.

Further, it is submitted that the bequest to this company is void for perpetuity. The articles provide that no dividends shall be declared and no capital shall be distributed on a winding-up, but shall be transferred to a similar society.

Tomlin, K.C., and *Hon. M. M. Macnaghten*, for the respondents. The decision of Joyce J. is right and the respondents are entitled to the legacy. The respondents are a limited company capable of holding property and taking a bequest like an individual. Whether or not some of the objects of the company may be open to objection, that does not affect the power of the company to take the legacy. Some of its objects may be illegal, and if it attempts to apply money to those objects it may be restrained from so doing. The company is not an illegal association. Suppose a company were formed for the purpose of carrying on a shipping business between (A) London and Hamburg and (B) London and Havre. Events have occurred which would no doubt render part (A) of the business illegal, and if the company attempted to carry on that trade it might be prevented. But nobody could say that because one part of its business was illegal therefore the other part, which was quite legitimate, could not be carried on; *Trevor* v. *Whitworth.* (3)

The question is whether there is anything in the memorandum

(1) (1837) 8 Sim. 614. (2) (1860) 28 Beav. 39.
(3) (1887) 12 App. Cas. 409.

C. A. 1915 BOWMAN *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN

and articles of the company which renders it an illegal association. If there be anything illegal in the memorandum and articles, that need not make the company itself an illegal association incapable of taking property. The legacy is not given for any special purpose, it is a gift to the company who may apply it to a good legal charity. Not a penny of this legacy need necessarily be applied to any illegal object. It is a gift to a legal entity with no obligation to apply it to any illegal purpose. It is not a gift fixed with a trust.

[WARRINGTON L.J. Could a gift to a company formed for the purpose of carrying on the business of highwaymen be supported ?]

To put an alternative case, it is submitted that a gift to a company formed for the purpose of procuring from Parliament the abolition of the Game Laws and to provide a fund for paying the fines of poachers would be good.

Here there are many objects which may be regarded more or less as main objects of the company. There is nothing illegal in object (*a*) in the memorandum. The principle there advocated is a system of philosophy like Positivism, a religious system founded upon philosophy in which the object of worship is Humanity considered as a single corporate being. (See the Oxford Dictionary.) That system has many followers. There is nothing illegal in holding or teaching such a doctrine. All the other objects are perfectly innocuous and legitimate. But it is said that even if the objects are not illegal still they are subversive of religion and are of such a nature that no Court will assist the company in getting the legacy. As to the alleged illegality of the gift, it is said that the objects of the Secular Society involve an offence against the law as to blasphemy. The question is what is blasphemy? The law is not now in doubt: Halsbury's Laws of England, vol. ix. p. 530. "It consists in (1.) scoffingly or irreverently ridiculing or impugning the doctrines of the Christian faith; or (2.) in uttering or publishing contumelious reproaches of Jesus Christ; or (3.) in profane scoffing at the Holy Scriptures or exposing any part thereof to contempt or ridicule. It is not blasphemy with due gravity and propriety to contend that the Christian religion or any part of its doctrine, or the whole or any part of the Holy Scriptures, is

untrue": *Shore* v. *Wilson* (1); *Rex* v. *Carlile* (2); *Reg.* v. *Hetherington* (3); *Rex* v. *Boulter.* (4) That is how the matter stands at common law.

As to the Blasphemy Act, there has never been a prosecution under it. With reference to the law as to the dissemination of anti-religious doctrines, a man is free to think, speak, and teach what he will subject to the style and temper in which he does it being such as will not bring him within the law as to blasphemy. It is not now illegal to propagate doctrines which are contrary to Christianity. Whether the book which has been put in evidence is blasphemous or not has nothing to do with the question. The fact that an officer of the society endeavours to promote the objects of the society in an improper manner does not make the society illegal.

In *Cowan* v. *Milbourn* (5) the Court took a different view of the law as to blasphemy from that which has been taken in the more recent cases. It is not disputed that a trust for an immoral purpose would be illegal even though the carrying of it out might not constitute a criminal offence.

There is no case in which a work propounding philosophical views in a temperate way has been held to be outside the protection of the law: Copinger on Copyright, 5th ed. pp. 72, 74. *Cowan* v. *Milbourn* (5) proceeded on the basis that the law of blasphemy was a narrower law than is now generally accepted.

[LORD COZENS-HARDY M.R. Has that case ever been questioned?]

Apparently not.

[*Cave, K.C.* It was cited with approval by Gorell Barnes P. in *Hyams* v. *Stuart King.* (6)]

That case does not affect the argument which is now submitted.

Those considerations do not affect the question whether the gift to this company is illegal or not.

The jurisdiction of the Ecclesiastical Courts over lay persons except in respect of a special class of offences has become

(1) 9 Cl. & F. 355, 524.
(2) (1819) 3 B. & Al. 161.
(3) (1840) 4 St. Tr. (N.S.) 590.
(4) 72 J. P. 188.
(5) L. R. 2 Ex. 230.
(6) [1908] 2 K. B. 696, 709.

C. A. 1915

BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

obsolete and is not now exercised: Halsbury's Laws of England, vol. xi. pp. 505, 513; *Phillimore* v. *Machon.* (1)

It is said that the Toleration Acts have removed disabilities from Jews, Roman Catholics, Unitarians, and others, but not from atheists.

Down to the time of Richard II. the only jurisdiction the Ecclesiastical Courts had was the power of excommunication. After that time the civil power could be invoked in aid of the Ecclesiastical Courts on account of the Heresy Acts having been passed. That was abolished in the reign of Edward VI., revived by Mary, and finally abolished by Elizabeth.

A limited company can never be subject to the penitential jurisdiction of the Ecclesiastical Courts. It has no soul. [They also referred to 2 Hen. 4, c. 15, 2 Hen. 5, c. 7, and the Report of the Commission upon the Ecclesiastical Courts, 1883, vol. i. p. xviii.; Historical Appendix, (II.) p. 52.]

There is no illegality in publishing or advocating opinions which tend to controvert the fundamentals of the Christian religion. It can only be argued that it is an offence against morality, or else that because it was originally an ecclesiastical offence the civil Courts will not assist the company in its claim to a legacy which in the opinion of those Courts may possibly be applied to an illegal purpose. Such an argument cannot now be supported.

Cave, K.C., in reply. It is said that the objects of the company are not all illegal. That is not the point. The question is whether the gift is for an illegal purpose. A gift to a company must be treated as a gift for the purposes of the company as set forth in its constitution.

A gift to an individual, e.g., to Mr. Foote (the chairman of the Secular Society, Limited), is a different thing. He may do what he likes with it. A company cannot, but is bound to apply it for its objects. The intention of the donor is that the company shall deal with the legacy in accordance with the main object of the company, namely, the furtherance of secularism. But it is said that the company need not apply it to any of its objects which are illegal. If its

(1) (1876) 1 P. D. 481.

objects are so mixed up that they cannot be separated, and the main object is illegal, that invalidates the legacy. The company cannot undertake not to apply it to object (*a*). That is the main object, all the others being ancillary. Without it the substratum of the company is gone: *In re German Date Coffee Co.* (1)

It is said that people cannot now be punished for their religious opinions. That is not the question, but whether the Court will hold a legacy for an illegal purpose to be valid. It is not necessary to consider the authorities as to whether the offence of blasphemy is now punishable. It is laid down in many authorities that any denial of the truth of Christianity in general or of the existence of God, however decent may be the terms of such denial, is punishable by the common law: Halsbury's Laws of England, vol. ix. p. 531. See note to *Reg.* v. *Bradlaugh.* (2) The earlier authorities are in favour of the stricter view.

[LORD COZENS-HARDY M.R. The current of recent authority is against you.

PICKFORD L.J. In *Reg.* v. *Ramsay* (3) Lord Coleridge said: "To asperse the truth of Christianity cannot per se be sufficient to sustain a criminal prosecution for blasphemy. And on the ground that in the sense understood by the judges in former times that Christianity is part of 'the law of the land' to suppose so is in my judgment to forget that law grows. The principles of law remain, and it is the great advantage of the common law that its principles do remain; but then they have to be applied to the changing circumstances of the times. This may be called by some retrogression, but I should rather say it is progression—the progress of human opinion. Therefore to maintain that merely because the truth of Christianity is denied without more, that, therefore, a person may be indicted for blasphemous libel is, I venture to think, absolutely untrue. It is a view of the law which cannot be historically justified." That is the argument against you.]

Pankhurst v. *Thompson.* (4) It is not essential to my case to say that the teaching of atheism is criminal. I say it is illegal,

(1) (1882) 20 Ch. D. 169.
(2) 15 Cox, C. C. 225.
(3) 15 Cox, C. C. 231, 235.
(4) 3 Times L. R. 199.

C. A. 1915

BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

i.e., it is contrary to law, even though it does not involve a penalty.

The argument is based upon two grounds. First, that the gift is illegal because it is to be devoted to an object which is an offence against the common law and also under the Blasphemy Act. In *Rex* v. *Carlile* (1) the only decision was that the Blasphemy Act had not abrogated the common law. No doubt there may have been no prosecutions under the Act, but *Shore* v. *Wilson* (2) was founded upon it. So also was *Cowan* v. *Milbourn*. (3) That case cannot now be disregarded. It is entirely consistent with the current of authority.

Secondly, it is submitted that a gift which is subversive of all religion is invalid: Halsbury's Laws of England, vol. iv. p. 153; *Thompson* v. *Thompson* (4); *Russell* v. *Jackson*. (5) But the Blasphemy Act alone is enough to conclude this case. The penalties are imposed upon persons who have been brought up as Christians, but that is not material. The offence is none the less contrary to the common law and to the policy of the Act. Atheism and heresy were punishable common law offences long before the statute. The late Professor Maitland in his Canon Law in the Church of England, pp. 158, 164, dealing with apostasy, cites Bracton, f. 123b, who considered that burning was a proper punishment for that offence; and he lived in the thirteenth century, long before any of the statutes against heresy were passed. By the Act 29 Car. 2, c. 9, which abolished the writ de haeretico comburendo, the powers of the Ecclesiastical Courts to punish atheism, blasphemy, and heresy were expressly reserved. In *Taylor* v. *Timson* (6) the Court expressly referred to the ecclesiastical law as binding on the laity. See also *Marshall* v. *Graham*. (7) The Courts have uniformly held that bequests for the purpose of combating religion are contrary to law, morality, and public policy. There is no case in which such a bequest has been upheld.

Until the law is altered it should be applied and such a bequest

(1) 3 B. & Al. 161.
(2) 9 Cl. & F. 355.
(3) L. R. 2 Ex. 230.
(4) 1 Coll. 395.
(5) (1852) 10 Hare, 204.
(6) 20 Q. B. D. 671.
(7) [1907] 2 K. B. 112.

cannot be held valid. The device of forming a limited company for the purpose of carrying out the objects of an illegal society ought not to succeed.

Cur. adv. vult.

July 30. LORD COZENS-HARDY M.R. Mr. Charles Bowman by his will left his residuary estate upon trust for the Secular Society, Limited. Joyce J. has declared that this gift of the residuary estate is valid. From this decision the heir-at-law and next of kin appeal.

There are two points which may at once be got rid of. This is not claimed to be a charity. The plaintiffs assert their right to the residuary estate as their own property. In the next place no question of perpetuity arises, because the plaintiff is a limited company, and, in the view of the law, a person competent to dispose of what is given. But it is argued on behalf of the appellants that the plaintiffs' society is illegal inasmuch as its objects are antagonistic to all religion, and therefore no Court ought to aid it in recovering the legacy. A limited company is bound by its memorandum of association. It cannot go outside its limits. I decline to look at anything but the memorandum, and in particular I have no right to consider whether the chairman or any of the directors of the company may have been guilty of what the law would undoubtedly regard as the publication of blasphemous libels. When I turn to the memorandum I see that it is one of those companies permitted by law, the objects of which are not pecuniary gain. No dividend or income can be received by any member of the company. It is a company limited by guarantee. When I look at the objects for which the company is formed I find that the principal object is: "(*a*) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief and that human welfare in this world is the proper end of all thought and action." [The Master of the Rolls then referred to the other objects stated in the company's memorandum of association, and continued:] I am not satisfied that any one of these objects is unlawful. Many of these objects are supported by a large section of the

C. A. 1915

BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.

Lord Cozens-Hardy M.R.

community, and I think it would be a retrograde step if we were to hold that there is necessarily any illegality in the company. I say "necessarily" because in my view it is not sufficient to say that the society acting by its directors may use the funds which they receive under this will for a blasphemous purpose, in which case the parties concerned may justly be exposed to an indictment. It is sufficient that they can so apply the money as to be free from any taint of illegality. If, however, any one of the objects in the memorandum were necessarily unlawful, for example for an immoral purpose, I do not think that the addition of other innocent objects would entitle the company to obtain the money, but in my view the facts do not bring the case within that principle. It has, however, been strenuously argued that blasphemy at common law is unlawful, even though it may not be a criminal offence, and there is no doubt a large body of ancient authority, and some modern authority, in support of this view. In my opinion the better view, and the one which ought to be followed, is that which was expressed by Lord Coleridge in *Reg.* v. *Ramsay* (1), and not that which was expressed by Stephen J. In substance the view of Lord Coleridge was that publications intended in good faith to propagate opinions on religious subjects which the persons who publish them regard as true are not blasphemy if it is done in a decent way and with regard to the feelings of others. Phillimore J. in a subsequent case has distinctly adopted this view, and I think it ought to be adopted in this Court. This is one of those subjects in which there have undoubtedly been great changes of opinion within the last 100 years, and I think within the last half-century. It is really a question of public policy, which varies from time to time. It is to my mind almost shocking to hold in the twentieth century that the publications of Positivists, and other schools of philosophers, who do not admit, and probably even deny, the existence of a God, are necessarily blasphemous. I think the older view must now be regarded as obsolete, and any decision to that effect ought no longer to be followed. I do not propose to go through the later authorities, which are numerous. I think the law is accurately

(1) 15 Cox, C. C. 231.

stated by Erskine J. in advising the House of Lords in *Shore* v. *Wilson* (1), where he says, after referring to various Toleration Acts, "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries." I think it is impossible to contend that the main object of the plaintiffs' society, as described in clause (*a*), cannot be given effect to without incurring liability to indictment for blasphemy at common law. It is, however, contended that this relaxation of old principles is limited to criminal blasphemy, and that it is sufficient for the present appellants to say that the object, though not illegal, either by statute or common law, is yet unlawful in the sense that the Court will not aid the plaintiffs to get the legacy. It seems to me that the undoubted relaxation of the views as to common law blasphemy must extend to matters outside the criminal law.

Thus far I have dealt with the case without referring to some comparatively modern authorities which undoubtedly present difficulties. *Briggs* v. *Hartley* (2), decided by Shadwell V.-C. in 1850, was simply this: A legacy for the best essay on Natural Theology treated as a science and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion; the Vice-Chancellor said: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and, therefore, it must fail." In my view that is a decision which ought not to be followed.

Cowan v. *Milbourn* (3) is a case which I feel great difficulty in following. The defendant had agreed to let rooms to the plaintiff, who was secretary to the Liverpool Secular Society. The defendant discovered that the rooms were to be used for the

(1) 9 Cl. & F. 524, 525. (2) 19 L. J. (Ch.) 416.
(3) L. R. 2 Ex. 230.

C. A.
1915
BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.
Lord Cozens-Hardy M.R.

purpose of having lectures delivered there in advance of the views of the society. The titles of the proposed lectures were published. The most material ones were: "The Character and Teachings of Christ: the former defective, the latter misleading." "The Bible shown to be no more inspired than any other book." "Catholicism, Protestantism and Secularism: which contains more truth and which is best calculated to benefit humanity." The defendants refused to carry out their contract, and it was held that the plaintiff could not recover on the ground that the lectures announced were blasphemous and illegal. Kelly C.B. based his judgment on the ground that Christianity is part and parcel of the common law of the land, and that therefore to support and maintain propositions indicated in the titles of the proposed lectures was a violation of the first principles of law and could not be done without blasphemy. Bramwell B. said that an act may be illegal in the sense that the law will not aid it, and yet that the law will not immediately punish it. It will be observed that there was nothing to indicate that the proposed lectures would not be delivered in decent and inoffensive language. So far as I am aware this case, which was decided in 1867, has never been followed, and, notwithstanding my profound respect for the learned judges who decided it, I am bound to say that I think it ought not to be followed. If *Cowan* v. *Milbourn* (1) is still good law, the plaintiffs cannot claim the legacy, but as I do not consider it is good law, I think Joyce J. was right in the view which he took and that the appeal must be dismissed.

PICKFORD L.J. The testator in this case left his estate, after providing for certain annuities and legacies, in trust for the Secular Society, Limited, and the question is whether that bequest is valid. Two objections were taken to its validity: (1.) that it is a bequest for purposes which are illegal, or if not illegal in the sense that they are criminal, at any rate contrary to public policy; and (2.) that it tends to a perpetuity.

The Secular Society, Limited, is a company registered under the Companies Acts, limited by guarantee. Its objects are stated in the memorandum of association. That memorandum has

(1) L. R. 2 Ex. 230.

already been read, and I do not think it necessary to read it again. The articles contain the following provisions as to application of funds, and dissolution or winding up, in articles 54 to 57. [The Lord Justice read them and continued:] The first question whether this is a bequest for purposes illegal or contrary to public policy depends, in my opinion, upon the question whether the objects of the society as expressed in the memorandum are illegal or contrary to public policy. It was contended on behalf of the heir-at-law and next of kin that the Court ought to look behind the purposes stated in the memorandum, and that in that case it would be found that the society was formed for the purpose of enabling an unregistered body called the Secular Society and its members to hold money bequeathed for their purposes, which it would be difficult for them to hold if bequeathed directly to them. It was also contended that if the actions and the writings of the members of that society were examined it would be found that their purposes included that of subverting the Christian religion, and of doing so by means which are illegal within any interpretation that has been put upon the law of blasphemy. I do not think we are at liberty to go behind the purposes stated in the memorandum. This is a bequest to the limited company and not to its members, and if the objects of the company are legal I do not think a bequest to it is invalid because its members apply the money to an illegal purpose, though they may by doing so subject themselves to punishments. It is therefore necessary only to consider the objects of the company and in substance only (*a*). I do not see anything illegal or contrary to public policy in the other objects, except so far as some of them may be ancillary to (*a*). If (*a*) be not illegal or contrary to public policy, then there is no legal objection to any of the objects. It is contended that a part of the object (*a*) is the denial and subversion of the Christian religion, and that to pursue that object is illegal in the strict sense of being a punishable offence. I do not think the pursuit of that object by a limited company is within the words of the statute 9 Will. 3, c. 35, which applies only to a certain class of persons, and therefore, if illegal, it must be so at common law.

C. A. 1915 BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN. Pickford L.J.

The law as to blasphemy has changed very much in the course of time, and much religious controversy is now considered perfectly unobjectionable which would have been punishable by the law in former years. I adopt the law as laid down by Lord Coleridge C.J. in *Reg.* v. *Bradlaugh* (1) and *Reg.* v. *Ramsay* (2) and followed by Phillimore J. in *Rex* v. *Boulter* (3); and adopting that interpretation of the law, I consider there is nothing in the objects stated in (*a*) that is punishable by the law.

A much more difficult question is whether this object, though not illegal in the sense of being punishable, is illegal in the sense that the law will not recognize it as being the foundation of legal right and will do nothing to aid it. The denial of religion is not in terms the object of the company as set out in (*a*), but I think that it is involved in it, and that it is not possible to promote the principle that human conduct should be based upon natural knowledge and that human welfare is the proper end of all thought and action without at any rate inferentially denying the Divine government of the world and the principles of religion. I think there is no doubt that in former times such an object would have been held to be contrary to public policy, but the question is whether it is right to hold so now. I think that the doctrine of public policy cannot be considered as being always the same and that many things would be, and have been, held contrary to public policy which are not so held now. I agree with what was said by Lord Coleridge in *Reg.* v. *Ramsay*. (4) It is true that he was speaking only of criminal law in that passage, but I think his words are equally applicable to civil rights. It must not be assumed that the objects of the company will be promoted by what has been called licentious and contumelious abuse applied to sacred things; they may be promoted by discussion of a perfectly orderly and decent character, and that being so, the object does not necessarily involve anything more than such discussion. I think that at the present day such discussion, though it does involve a denial of religion, ought not to be held contrary to public policy, and

(1) 15 Cox, C. C. 217.
(2) 15 Cox, C. C. 231.
(3) 72 J. P. 188.
(4) 15 Cox, C. C. 235.

that the doctrine should be confined to denials of religion of the nature described by Lord Coleridge.

I do not propose to discuss the authorities cited to us at any length, as they are fully dealt with by the other members of the Court, but it is perhaps necessary to mention two of them, i.e., *Briggs* v. *Hartley* (1) and *Cowan* v. *Milbourn*. (2) In the former Shadwell V.-C. held a bequest for the best essay on Natural Theology treated as a science and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion invalid because inconsistent with Christianity; and in the latter the Court of Exchequer, Kelly C.B., Martin B., and Bramwell B., held a contract for the letting of rooms for lectures contrary to the Christian religion not binding. The nature of the lectures is only to be gathered from the titles, and the title most referred to is: "The Character and Teachings of Christ: the former defective, the latter misleading." Whatever may have been the doctrine as to public policy prevailing in 1850, when the former case was decided, I do not think that it ought now to be followed. If the latter decision means that no consideration will support a contract which involves any questioning of the truth of religion, I also think that should not be followed, but the Court may have inferred from the title to which I referred that the lectures attacked religion in a reviling and contumelious manner, and if that were the case, the decision was, I think, right.

For these reasons I do not think that the objects of the company were illegal in either of the senses in which that word was used.

On the question of perpetuities I do not think it necessary to add anything to what has been said by the Master of the Rolls.

WARRINGTON L.J. Charles Bowman, the testator, by his will, directed that after the death of his wife his trustees should convert into money the whole of his estate, and, after making certain payments out of the proceeds, should stand possessed of the ultimate residue thereof in trust for the Secular Society,

(1) 19 L. J. (Ch.) 416. (2) L. R. 2 Ex. 230.

C. A. 1915 BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN. Warrington L.J.

Limited. The testator died in 1908 and his wife in 1914. The question was then raised whether or no the gift of the residue was in law capable of taking effect. An originating summons was issued for the purpose of determining this question. Joyce J. has decided in favour of the gift. The heir-at-law and the next of kin of the testator appeal, contending that the gift of the ultimate residue is for an unlawful purpose and therefore void, and that there is consequently an intestacy.

The Secular Society is a company incorporated under the Companies Acts. The memorandum of association states that the objects for which the company is formed are "(*a*) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action"; and to promote a number of other ends, political and otherwise, and to do a number of other things, which it is unnecessary to specify. The appellants contend that the principle above set forth involves the rejection of all religious sanctions for human conduct and of all religious belief and that to promote such a principle is to promote atheism and irreligion and is unlawful. They contend further that a gift to or a trust for a company incorporated with such an unlawful object, whether that object be merely one of many or, as they say it is in this case, the main and governing object of the company, the others being merely ancillary thereto, is a gift or a trust for an unlawful purpose and is therefore void. On the construction of this memorandum I think the "objects clause" divides itself into two parts, one being clauses (*a*) to (*h*) inclusive, the other being contained in clauses (*i*) to (*o*). The real and substantial objects with which the company is incorporated are those expressed in the first part, the matters mentioned in the second part are incidental or ancillary only. The object expressed in clause (*a*) is one at all events of the real and substantial objects with which the company is formed, and I think we are driven to conclude that money given to the company is given to be used in furtherance of that object which thus becomes the purpose of the gift. So far I agree with the appellants that if the promotion of the

principles described in clause (*a*) is illegal the gift in question is given for an illegal purpose. Further, I think the principle as described in the memorandum does involve the negation of any religious sanction for human action and to this extent may be said to tend to the subversion of religion as an active force in human life. It is moreover impossible to reconcile such a principle with a belief in the Divine government of the world or in revelation, and it must therefore be taken to involve a denial of the truth of such a belief, and to promote it would be to promote atheism. The question, therefore, comes to this: Is the mere promotion of a principle involving the characteristics above mentioned an illegal act? It would, of course, be illegal if it amounted to an offence of blasphemy at common law. In Halsbury's Laws of England, vol. ix. p. 531, this offence is said to consist in (1.) scoffingly or irreverently ridiculing or impugning the doctrines of the Christian faith, or (2.) uttering or publishing contumelious reproaches of Jesus Christ, or (3.) profane scoffing at the Holy Scriptures or exposing any part thereof to contempt or ridicule; but it is not blasphemy with due gravity and propriety to contend that the Christian religion or any part of its doctrine or the whole or any part of the Holy Scriptures is untrue. The accuracy of this definition has been disputed, and it has been said that any denial of the truth of Christianity in general or of the existence of God, however decent may be the terms of such denial, is by the common law punishable as blasphemy (see Stephen's Digest of Criminal Law, 5th ed. p. 125, and Kelly C.B. in *Cowan* v. *Milbourn* (1), as to which case I have something to say presently on another point). But in my opinion the weight of authority is strongly in favour of the accuracy of the definition (see per Lord Coleridge in *Reg.* v. *Ramsay* (2) and per Phillimore J. in *Rex* v. *Boulter* (3)). On this point I desire particularly to refer to the opinion of Erskine J., advising the House of Lords, in *Shore* v. *Wilson.* (4) He says this: "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would

(1) L. R. 2 Ex. 230.
(2) 15 Cox, C. C. 231.
(3) 72 J. P. 188.
(4) 9 Cl. & F. 355, 524.

C. A. 1915 BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN. Warrington L.J.

be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it." In my opinion, therefore, the promotion of the principle in question, provided it be done with due gravity and propriety, would not be illegal in the sense of being an offence at common law.

The next question is whether it is made illegal by the statute of 9 Will. 3, c. 35. Under the terms of that statute any person having been educated in or at any time made profession of the Christian religion who by writing, printing, teaching, or advised speaking asserts or maintains that there are more Gods than one, or denies the Christian religion to be true or the Holy Scriptures to be of Divine authority, is guilty of an offence under the Act. That is to say, this statute renders the conduct described an offence only in the case of persons answering a particular description. In my opinion it would not be right to assume that the agents of the company who carry out its objects will be persons answering that description. Unless that assumption is made the object we are considering is not rendered illegal by the statute. I am aware that wherever this statute has been referred to the words limiting its application to a particular class have been ignored, but on the other hand the words are there, and when the statute is relied upon as creating an offence they cannot, in my opinion, be left out. So far as can be now ascertained there has never been a prosecution under it, and its effect has therefore not been directly tested. I think I may safely say that nowadays it would be strictly construed. Next the purpose of the gift is said to be illegal because by the express terms of the statute 29 Car. 2, c. 9, by which the writ de haeretico comburendo was abolished, the jurisdiction of the Ecclesiastical Courts in cases of atheism, blasphemy, heresy or schism, and other damnable doctrines and opinions is preserved, and those Courts may punish the same by ecclesiastical punishment and censure. In my opinion a gift cannot properly be held invalid on the ground that it is given for a purpose which may be contrary to ecclesiastical law but is not otherwise illegal. Lastly it

is said that the purpose of the gift is against public policy and therefore illegal. The doctrine that contracts ought not to be enforced or legal sanction ought not to be given to legacies or trusts otherwise valid and effectual on the ground of public policy ought to be applied with the utmost caution. As to this Lord Bramwell made some pertinent remarks in the case of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1); he says: "'Public policy,' said Mr. Justice Burrough (I believe quoting Chief Justice Hobart), 'is an unruly horse, and dangerous to ride.' I quote also another distinguished judge, more modern, Mr. Justice Cave: 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.' I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences?" In respect of such a matter as the discussion of questions affecting religion the views of men as to what is or is not contrary to public policy vary with the times. It is not so very long ago that the promulgation of the views of Charles Darwin on the "Origin of Species" or those of Robertson Smith on the incorrectness of the attribution of certain books of Scripture to the traditional authors was regarded by many as tending to subvert the foundations of revealed religion, but at the present time most people of education, at all events judging from the experience of the past, would regard temperate and instructed discussion of such subjects as tending rather to strengthen than to weaken the real foundations and at all events would not for a moment think that to allow such discussion is against the public interest. In my opinion, therefore, we ought not to hold the gift in the present case to be invalid on the ground now under consideration, unless we are bound so to do by authority of such a kind that to refuse to follow it would be to alter the law.

(1) [1892] A. C. 25, 45.

C. A.
1915
BOWMAN, *In re.* SECULAR SOCIETY, LIMITED *v.* BOWMAN.
Warrington L.J.

The cases as to charities do not seem to me to be in point. It may well be that a trust which could not be supported as a charity because it could not be brought within the spirit and intendment of the Statute of Elizabeth might yet be not illegal if expressed in such a way as not to infringe the rule against perpetuities. In *De Costa* v. *De Paz* (1) a gift for encouraging the preaching of the Jewish religion was held to be bad, the reason given being that to preach a religion contrary to the Christian religion could not be a good charity. On the other hand, where a gift was capable of being supported as one for the relief of the poor it was held good, though the form of relief given was the supply of the materials necessary for the due performance of the Jewish rites (see *Straus* v. *Goldsmid* (2)).

As to the suggested non-existence of copyright in books impugning the veracity of the Scriptures there seems to be no actual decision. In some cases injunctions protecting the copyright have been refused on the ground that until the plaintiff had brought an action and established his copyright the Court of Chancery would not interfere, but in none has there been any detailed examination of the impugned book or any consideration of the mode in which the author's views are presented. It is true that in *Lawrence* v. *Smith* (3) Lord Eldon said that the law does not give protection to those who contradict the Scriptures, but this was a mere dictum, the learned Lord Chancellor refusing the injunction on the ground mentioned above. The appellants in this part of their case relied chiefly on *Cowan* v. *Milbourn*. (4) The question there was whether a man who had let certain rooms for the purpose of lectures and afterwards discovered that the lectures to be delivered were of a blasphemous nature was bound by his contract. The subject of the proposed lectures could only be guessed by their titles. One of them was: "The Character and Teachings of Christ: the former defective, the latter misleading." The Court there held that the proposed lectures, judging from their titles, were blasphemous and the purpose of the letting was unlawful and the contract could not be enforced. I think Kelly C.B. thought that the

(1) 2 Swans. 487, n.
(2) 8 Sim. 614.
(3) Jac. 471, 474.
(4) L. R. 2 Ex. 230.

delivery of the lectures would amount to the common law offence of blasphemy. He mentions in particular the lecture the title of which is set out above, and he may well have thought that to impugn the character of Christ must necessarily involve that offence even according to the narrow definition: I infer, however, from the words he has used, that he would have hardly accepted that as correct. Bramwell B. founds his statement that the purpose was unlawful on the Act of William III., and also refers particularly to the same lecture. Neither of the judges really dealt with the question whether the lectures, if not infringing a positive ordinance of law, would have rendered the contract incapable of being enforced. It is quite true that Bramwell B. laid it down that a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it, but accepting this as correct, as I think it clearly is, it still remains to consider whether the particular thing in question is unlawful in the wider sense or not.

In my opinion there is no authority binding us to hold that the promotion in a proper manner of the objects of the company is contrary to public policy, and we ought not to hold it to be so.

I have already said that it is, in my opinion, not unlawful on the other grounds suggested, and the appeal therefore fails.

Solicitors: *Calder Woods & Pethick; Harper, Battcock & Goode.*

G. A. S.

SARGANT J.

1915

Oct. 13.

BUCHAN *v.* AYRE.

[1913 B. 2308.]

Costs—Taxation—Plaintiff's Solicitors' Bill reduced by One-sixth—"Fund or estate (real or personal)"—Action for Indemnity by Trustee—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 38B.

A trustee of leasehold property, on which at the request of his cestuis que trust he had created incumbrances involving a personal liability on his part, brought this action claiming to be indemnified by them personally and also out of the property. By the order made in the action the Court declared that the plaintiff was entitled to be indemnified out of the property against his personal liability and costs, including the costs of the action, and gave the plaintiff liberty to apply for giving effect to his indemnity, if not completed within six months, and directed taxation of the plaintiff's costs. The plaintiff's solicitors' bill was reduced on taxation by more than one-sixth, and the taxing Master, holding that the case fell within the provisions of Order LXV., r. 27, sub-r. 38B, disallowed the solicitors their costs of drawing and copying the bill and of attending the taxation. On a summons to review:—

Held, that the plaintiff's costs were not payable out of a "fund or estate (real or personal)" within the meaning of sub-r. 38B, and that the taxing Master was wrong in disallowing these costs.

ADJOURNED SUMMONS.

The defendants Ayre and Kingcome were builders, who, having acquired a freehold estate in Wandsworth, erected thereon a number of small houses, on the completion of which they granted long leases to the plaintiff, as their trustee, reserving ground rents to themselves, and the plaintiff executed a declaration of trust of the leases accordingly, dated July 15, 1907.

The plaintiff was registered as proprietor of these leases, and, at the request of the defendants Ayre and Kingcome, executed mortgages thereof by way of registered charges, subject to an implied covenant by the plaintiff for payment of principal and interest, the moneys advanced being received by the defendants Ayre and Kingcome. In 1912 the defendants Ayre and Kingcome transferred their business and assets to the defendant company, Ayre & Kingcome, Limited. The defendants Bray and Hickley were mortgagees under registered charges of the leasehold property to which this action related.

This action was brought by the plaintiff, claiming a declaration that in respect of the principal moneys and interest payable under the registered charges he was entitled to be indemnified by the defendants Ayre and Kingcome and Ayre & Kingcome, Limited, personally, and also to be indemnified out of the said properties against the principal moneys and interest charged thereon, and the costs, charges, and expenses incurred by the plaintiff in relation thereto, including the costs of this action, in priority to any claim by the defendants Hickley and Bray in respect of their subsequent charges; and that the costs of this action might be provided for by payment from the defendants Ayre and Kingcome and the defendant company or by charge upon the properties.

By an order dated June 17, 1914, the Court declared that the plaintiff was entitled to be indemnified out of the properties against his personal liability in respect of the registered instruments of charge, and his costs, charges, and expenses in relation thereto, including his costs of the action, in priority to any claim by the defendants Hickley and Bray in respect of their registered charges, and gave the plaintiff liberty to apply to the judge in chambers for giving effect to his indemnity if not completed within six months from the date thereof, and referred it to the taxing Master to tax as between solicitor and client the plaintiff's costs of the action, including any charges and expenses properly incurred by him as trustee. And the plaintiff thereby undertook to complete any sales of the properties already made by the defendants and all proper sales which might during the said period of six calendar months be effected by them, the question of the propriety of any such sale to be decided by the judge in chambers.

The properties or some of them had since been sold accordingly and the purchase-moneys received by the plaintiff.

On taxation of the plaintiff's costs his solicitors' bill was reduced by more than one-sixth, and the taxing Master being of opinion that the case fell within Order LXV., r. 27, sub-r. 38B (1),

(1) Order LXV., r. 27, sub-r. 38B: "If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges

SARGANT J. allowed no costs to the plaintiff's solicitors for drawing and copying their bill nor for attending the taxation.

1915

BUCHAN v. AYRE.

In answer to the plaintiff's written objections to the disallowance the taxing Master stated the reasons of his decision as follows: "Mr. Buchan was appointed by Messrs. Ayre and Kingcome a trustee of certain leasehold property of which he executed certain mortgages at their request and incurred personal liability. The properties have since been sold and the purchase-money is in the hands of Mr. Buchan. Under these circumstances I think that a fund was created by Messrs. Ayre and Kingcome, and the costs are payable out of that fund."

This was a summons by the plaintiff to review the taxation.

J. H. Stamp, for the summons. The taxing Master was wrong in deciding that the present case fell within the provisions of sub-r. 38B. The question depends on the nature of the action and the effect of the order of June 17, 1914. I admit that after that order the plaintiff could not have insisted on the personal liability of the defendants Ayre and Kingcome or the defendant company, but if these defendants did not personally pay his costs, the plaintiff was at liberty to apply for payment out of the property. This left it open to the defendants to pay the costs personally. The plaintiff's right to indemnity was personally enforceable against the defendant company as well as against the defendants Ayre and Kingcome: *Hardoon* v. *Belilios*. (1) If the reasons given by the taxing Master are right they would apply equally to an ordinary action between mortgagee and mortgagor. The decision of Chitty J. in *Simmons* v. *Simmons* (2) is in my favour though not directly in point. The sub-rule is intended to apply to cases of administration for the benefit of a class of persons and not to such a case as the present. [He also referred to the notes in the Annual Practice, 1916, p. 1308, and the Yearly Practice, 1916, p. 1208.]

Whitmore Richards, for the defendant company. The answer

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and disbursements contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation."

(1) [1901] A. C. 118.

(2) (1895) 39 Sol. J. 673.

to the present summons lies in the facts. The plaintiff was admittedly a trustee, and as trustee his remedy in respect of his personal liability lay in obtaining execution of the trusts and payment out of the trust property. The case is within the express terms of sub-r. 38B. The relation of mortgagee and mortgagor is different from that of trustee and cestui que trust, but I do not admit that, so far as costs are payable out of the mortgaged property, the sub-rule is necessarily inapplicable even as between mortgagee and mortgagor. It is admitted that the effect of the order of June 17, 1914, was to relieve the defendants from personal liability, and I submit that the order amounts in effect to a direction for payment out of the property. There is no reason for limiting the words "real and personal estate" in the sub-rule to the estate of a deceased person.

SARGANT J. This is a summons to review the taxation of a bill of costs. The question is one of some general interest, namely, whether Order LXV., r. 27, sub-r. 38B, applies to the case. The action arose in the following way. Two builders were erecting buildings on their own freehold land to which they were entitled in fee simple. They thought, however, that they could deal with the property more satisfactorily if they could split it up into two parts—freehold ground rents and leases subject to those ground rents. They arranged with the plaintiff to accept leases from them, and he became a trustee of the leases for them and entitled to an absolute indemnity from them on the principle of *Hardoon* v. *Belilios* (1) in respect of the liability which he incurred. The builders afterwards assigned their interests to a limited company which they formed to take over the property. There were also some mortgages to parties who were other defendants to the action, but these mortgagees have now been paid off and are not now represented before me. After a time the plaintiff wished to be released from the liability which he had incurred on behalf of the two builders and the company, and he brought this action for the purpose. By the order made in the action his right to indemnity was established. In my opinion he would have been entitled to a personal order for an

(1) [1901] A. C. 118.

SARGANT J. 1915 BUCHAN v. AYRE.

indemnity against the builders and the company, but he was contented with an order by which his right to an indemnity out of the property was declared and liberty was reserved to him to apply to have the indemnity enforced; and Mr. Stamp on the part of the plaintiff admits that the result of the order was that the plaintiff gave up his personal right of indemnity against those three defendants.

The order went on to provide that the plaintiff's costs, charges, and expenses as trustee—he had in fact executed a declaration of trust—were to be taxed, and that as to these costs he was entitled to apply to have the indemnity enforced. His solicitors brought in their bill of costs and disbursements, and in the result it has been reduced by one-sixth or more; and the taxing Master, on the application of the defendant company, has disallowed the solicitors their costs of drawing and copying the bill and of attending the taxation on the ground that the case comes within the provisions of Order LXV., r. 27, sub-r. 38B, which is as follows: [His Lordship read the sub-rule and continued.] The question is whether these costs are within the meaning of the sub-rule payable out of "a fund or estate (real or personal)."

There is no direct authority on the point, for *Simmons* v. *Simmons* (1) was decided on another ground, namely, that the liability was a personal one of the party and that no order had been made for payment of the costs out of the property. In the present case, however, the order in my opinion does amount to an order for payment of the plaintiff's costs out of the land in question, though the means of giving effect to the order were left to be separately taken at a future time. The real question is whether the property is a "fund or estate." In my opinion it is not. I think that the sub-rule aims at something in the nature of administration for the benefit of a class of persons. The note to the sub-rule in the Annual Practice, 1916, p. 1308, which seems to me well founded, says: "In order that this rule may apply the taxing officer must find that a fund or estate is made liable by the order before him (*Simmons* v. *Simmons*). (1) It would seem that the rule does not apply to the taxation of the costs of a successful litigant against a company in liquidation

(1) 39 Sol. J. 673.

the reference to liquidation remaining from the time when companies were wound up in the Chancery Division." Moreover, if the wider effect contended for by Mr. Richards were to be given to the sub-rule, it appears to me that it would apply to cases of mortgagor and mortgagee, at all events to that class of mortgages in which there is no personal liability on the part of the mortgagor, but only a charge upon property; and, though Mr. Richards would not admit as much in terms, I have no doubt whatever that it is the practice not to deal under this sub-rule with an ordinary mortgagee's action as distinguished from a debenture-holder's action or other action in which property is being administered for the benefit of a class of creditors. Here there was merely an individual contract between the plaintiff and the two builders who transferred their interest to the defendant company, as a result of which the plaintiff has become entitled to be paid, if necessary, by means of the realization or enforcement of a charge against a particular property. But in my opinion that does not constitute the property a "fund or estate" within the meaning of the sub-rule. In my opinion "fund or estate" must be construed with reference to the other words in the rule "real or personal, or out of the assets of a company in liquidation"; and looking at these expressions as a whole I think that the present case does not fall within the words. The plaintiff's objections must be allowed and the matter referred back to the taxing Master to vary his certificate accordingly.

Solicitors: *Morton & Patterson; Stubbs & Latham.*

A C.

SARGANT J.
1915
Oct. 14, 26.

In re DACRE.
WHITAKER *v.* DACRE.

[1913 D. 992.]

Administration—Trustee in default—Set-off or Retainer—Legacy under Will—Derivative Title.

The benefit taken by a defaulting trustee under a will can be retained to make good his default whether that benefit came to him by original or derivative title.

W., who died in 1904, by his will appointed D. and two other persons his executors and trustees and bequeathed a legacy, which had not yet been paid, to D.'s wife. The wife died in 1909, having by her will appointed D. her sole executor and universal legatee. D. did not prove his wife's will and died insolvent in 1913, having by his own will appointed executors to whom administration with the will annexed to the estate of the wife had since been granted. On D.'s death he was found to have misappropriated trust moneys, part of W.'s estate :—

Held, that, as well according to the principle stated in *Jacubs* v. *Rylance* (1874) L. R. 17 Eq. 341 and *Doering* v. *Doering* (1889) 42 Ch. D. 203, as according to the broader principle stated in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442 and *In re Akerman* [1891] 3 Ch. 212, the surviving trustee of W.'s will was entitled to retain D.'s beneficial interest in the wife's legacy to make good the trust moneys misappropriated by him.

ADJOURNED SUMMONS.

John Gillham Womack, who died in 1904, by his will appointed Henry Dacre, Mary Matilda Womack (since deceased), and Frederick Womack his executors and trustees, and bequeathed a legacy of 2000*l.* (which had not yet been paid) to Alice Dacre, the wife of Henry Dacre. Alice Dacre died on November 6, 1909, having by her will dated March 20, 1909, devised and bequeathed her real and personal estate to Henry Dacre, whom she appointed her sole executor. Henry Dacre did not prove his wife's will and died in May, 1913, having by his own will appointed John William Dacre and John Charles Dacre his executors, to whom letters of administration with the will annexed to the estate of Alice Dacre were granted on June 12, 1915.

On the death of Henry Dacre it was discovered that in 1912 or 1913 he had received three cheques for 500*l.* each paid to him on account of the trustees of the will of John Gillham Womack which he had misappropriated and paid into his private account

at his own bank. At the date of Henry Dacre's death there was standing to the credit of that account a balance of 215*l.* 5*s.* 9*d.*, and the balance had never fallen to a lower figure.

The present action was a creditor's action for the administration of the estate of Henry Dacre, who died insolvent, the conduct of which had been given to Frederick Womack. The present summons was taken out by Frederick Womack as surviving executor and trustee of the will of John Gillham Womack claiming (1.) payment to himself of the said balance of 215*l.* 5*s.* 9*d.*, and (2.) a declaration that he was entitled to set off or retain such part of the legacy of 2000*l.* bequeathed to Alice Dacre as had devolved beneficially on Henry Dacre, to an amount equal to the sum of 1500*l.* or the balance thereof after making the payment aforesaid.

Evidence was given by the applicant that to the best of his belief Alice Dacre left no debts of any kind and that there were no expenses in connection with her estate other than testamentary expenses.

A. C. Nesbitt, for the summons. Upon the first point I rely upon *In re Hallett's Estate.* (1) The sum standing to the credit of Henry Dacre was never less than the 215*l.* 5*s.* 9*d* in question, and the applicant is accordingly entitled to the whole of this balance. As to the second point, the claim to retain the legacy, there is here a mutual credit within the Bankruptcy Act, 1883, s. 38, re-enacted by the Bankruptcy Act, 1914, s. 31. The balance of the 2000*l.* legacy, whatever it may be, is payable to Henry Dacre beneficially and the debt is due from him, and accordingly both debts are due in the same right: *Bailey* v. *Finch.* (2) If that is not so, this is a case of equitable set-off: *Cherry* v. *Boultbee* (3); *In re Akerman* (4); and Henry Dacre, who is a defaulting trustee, cannot be allowed to take a benefit out of the estate without first augmenting it to the measure of his own liability. The decision in *In re Peruvian Railway Construction Co.* (5), although actually against me, would

(1) (1880) 13 Ch. D. 696.
(2) (1871) L. R. 7 Q. B. 34.
(3) 4 My. & Cr. 442.
(4) [1891] 3 Ch. 212.
(5) Ante, p. 144; affirmed in C. A., ante, p. 442.

SARGANT J. have been in my favour but for the special fact that the debt did not arise there until after insolvency. Here Henry Dacre was a debtor in his lifetime, and his executors, although they now directly represent Alice Dacre, cannot assert a higher right than Henry Dacre would have had. It should be assumed on the evidence of her brother that there are no debts of Alice Dacre or claims in the administration of her estate which would exhaust the 2000*l.*, but, whether that be so or not, the applicant only seeks to descend on the ultimate beneficial interest of Henry Dacre whatever it may prove to be.

1915

DACRE, *In re.* WHITAKER *v.* DACRE.

Owen Thompson, for the executors of Henry Dacre. I do not contest the first point. As to the second point, however, the legacy of 2000*l.* to Alice Dacre cannot be retained to answer the default of Henry Dacre. *Bailey* v. *Finch* (1) was adversely commented on in *Ex parte Morier* (2), which is conclusively against the applicant. Nor can there be an equitable set-off here. There was no person in Henry Dacre's lifetime who could give a discharge for the legacy, and the right to receive it has only now arisen by reason of letters of administration having been granted to Alice Dacre's estate. My clients claim directly through her, and it is only accident that they are Henry Dacre's executors also. As representing Alice Dacre they owe the applicant nothing. In any case an order cannot be made against them without administering Alice Dacre's estate. *Cherry* v. *Boultbee* (3) does not apply to this case.

Dighton Pollock, for a creditor appointed to represent general creditors of Henry Dacre, supported the same argument, and further referred to *Rees* v. *Watts* (4) and *Bousfield* v. *Lawford*. (5)

A. C. Nesbitt in reply.

Cur. adv. vult.

Oct. 26. SARGANT J. delivered a written judgment in which, after stating the facts, he said that as to the first point the claim was admitted to fall within the decision of the Court

(1) L. R. 7 Q. B. 34.
(2) (1879) 12 Ch. D. 491.
(3) 4 My. & Cr. 442.
(4) (1855) 11 Ex. 410.
(5) (1863) 1 D. J. & S. 459.

of Appeal in *In re Hallett's Estate* (1), and that the applicant was therefore entitled to be paid the sum of 215*l.* 5*s.* 9*d.*, and continued: As regards the second claim the following additional facts have to be stated. The testator by his will gave four preferential legacies free of duty, including a legacy of 2000*l.* to his sister Alice Dacre, the wife of Henry Dacre. Mrs. Dacre died on November 6, 1909, having by her will dated March 20, 1909, given all her real and personal estate to her husband, Henry Dacre, and appointed him sole executor thereof. The applicant, who was a brother of Mrs. Dacre, swears (though I think this is really immaterial) that to the best of his knowledge, information, and belief she left no debts of any kind and there were no expenses in connection with her estate other than testamentary expenses. Henry Dacre never proved his wife's will or received any payment in respect of the legacy of 2000*l.*, and indeed sufficient assets have not been received from the estate of the testator to pay the said four preferential legacies, and no part of any of such legacies has yet been paid. After the death of Henry Dacre, namely, on June 12, 1915, letters of administration with the will annexed of the estate of Alice Dacre were granted to the defendants John William Dacre and John Charles Dacre as the executors of the will of Henry Dacre.

On these facts I am of opinion that the second claim also of the applicant is well founded and that the legacy of 2000*l.* or so much thereof as would otherwise have come to Henry Dacre or his estate as sole beneficiary under the will of Alice Dacre can be retained by the applicant to an extent sufficient to satisfy the balance of the liability of Henry Dacre in respect of the misappropriation of the three cheques of 500*l.* each. That this would be so if the legacy of 2000*l.* had been to Henry Dacre himself is abundantly clear and was hardly contested by the counsel for the executors and the representative creditor. And that the same principle applies to a person taking, as Henry Dacre did, by way of derivative title is rendered clear by the decision of Sir George Jessel M.R. in *Jacubs* v. *Rylance* (2) and that of Stirling J. in *Doering* v. *Doering*. (3) These two decisions

(1) 13 Ch. D. 696. (2) L. R. 17 Eq. 341.
(3) 42 Ch. D. 203.

SARGANT J. indeed are founded on the somewhat technical view that a defaulting trustee must be deemed to have already paid himself to the extent of his default. But the result must be the same on the much broader principle of *Cherry* v. *Boultbee* (1) and *In re Akerman* (2), that a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation. On either view it is obviously immaterial whether the title under which the defaulter claims a benefit is an original title or a derivative title.

1915

DACRE, *In re.* WHITAKER *v.* DACRE.

Accordingly on the second head also I make the declaration asked for.

Solicitors: *Lindsay, Greenfield & Masons; Blundell, Gordon & Co., for Gordon, Hunter & Duncan, Bradford; Maude & Tunnicliffe.*

(1) 4 My. & Cr. 442. (2) [1891] 3 Ch. 212.

A. C.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1915, will be as follows:—

In the First Series,
[1915] 1 Ch. [1915] 2 Ch.

In the Second Series,
[1915] 1 K. B. [1915] 2 K. B. [1915] 3 K. B. [1915] P.

In the Third Series,
[1915] A. C.

INDEX.

ACCIDENT—Insurance.
See under INSURANCE (ACCIDENT).

ADMINISTRATION—*Bequest to Special Trustees of Legacy settled on Persons in Succession—Different Rates of Duty—Legacy Duty on Life Interest—Duty wrongly paid out of Capital of Legacy by Executors beneficially entitled—Recoupment by Tenant for Life.*

The executors of a will wrongly paid the legacy duty payable in respect of the life interest in a settled legacy, bequeathed to special trustees, out of the capital of the settled legacy which, subject to the life interest, was to fall into residue and be held in trust for the testator's widow for life and after her death for his brother absolutely. The widow and brother were two of the executors, the remaining executor being also one of the special trustees, both of whom were solicitors. In accordance with the provisions of the Legacy Duty Act, 1796, the duty payable in respect of the life interest should have been retained and paid by the special trustees in equal yearly instalments out of the income during the first four years of the life tenancy.

The amount of the settled legacy less settlement estate duty and legacy duty was paid to the special trustees, and after the lapse of seven years the special trustee who made the wrong payment of duty sought to make the tenant for life recoup out of the income of the settled legacy the legacy duty so paid out of capital:—

Held, that the error must be rectified, and that what had been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income.

In re Horne [1905] 1 Ch. 76 commented upon. *In re* AINSWORTH. FINCH *v.* SMITH
Joyce J. 96

2. —— *Insolvent Estate — Transfer from Chancery Division to Court of Bankruptcy—Bankruptcy Act*, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 130, *sub-s.* 3.

In an action in the Chancery Division for the administration of the estate of a deceased person an order for administration was made on February 22, 1915, the summons to proceed on accounts and inquiries was issued on May 5, and the advertisements for creditors required their claims to be sent in by July 19 and fixed July 23 as the date for adjudicating on them. An applicant that the proceedings might be ordered to be transferred to the Court of Bankruptcy produced correspondence from the executrix's solicitors stating that so many claims had reached them that they did not know whether there would be sufficient to pay the creditors in full:—

Held, that there was not evidence sufficient to satisfy the Court that the estate was insufficient to pay its debts, and that, however that might be, there was no such circumstance of convenience, delay, or expense as justified the Court in making the order for transfer.

In re York (1887) 36 Ch. D. 233 and *In re Kenward* (1906) 94 L. T. 277 distinguished.

Quaere, whether an order for transfer under s. 130, sub-s. 3, of the Bankruptcy Act, 1914, can be made after judgment in the administration action. *In re* HAY. STANLEY GIBBONS, LIMITED *v.* HAY – – – **Sargant J. 198**

3. —— *Trustee in default—Set-off or Retainer—Legacy under Will—Derivative Title.*

The benefit taken by a defaulting trustee under a will can be retained to make good his default whether that benefit came to him by original or derivative title.

W., who died in 1904, by his will appointed D. and two other persons his executors and trustees and bequeathed a legacy, which had not yet been paid, to D.'s wife. The wife died in 1909, having by her will appointed D. her sole executor and universal legatee. D. did not prove his wife's will and died insolvent in 1913, having by his own will appointed executors to whom administration with the will annexed to the estate of the wife had since been granted. On D.'s death he was found to have misappropriated trust moneys, part of W.'s estate.:—

Held, that, as well according to the principle stated in *Jacubs* v. *Rylance* (1874) L. R. 17 Eq.

ADMINISTRATION—*continued.*
341 and *Doering* v. *Doering* (1889) 42 Ch. D. 203, as according to the broader principle stated in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442 and *In re Akerman* [1891] 3 Ch. 212, the surviving trustee of W.'s will was entitled to retain D.'s beneficial interest in the wife's legacy to make good the trust moneys misappropriated by him. *In re* DACRE. WHITAKER *v.* DACRE
Sargant J. 480

ALIEN ENEMY—Company—English company with alien enemy shareholders—Right of alien to vote at meetings—Licensed English branch of alien enemy bank—Intercourse – – – – 124
See COMPANY. 2.

—— Trading with the enemy.
See under TRADING WITH THE ENEMY.

ANNUITY — Will — Settlement — Annuities — Charge upon realty and personalty—Insufficiency of income—Deficiency paid out of corpus — Recoupment—Tenant for life and remainderman – – 290
See WILL. 6.

ANTICIPATION — Restraint on anticipation—Spinster—Compensation – – 283
See ELECTION.

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

—— Power of—Will—Special power—Delegation—Exercise—Invalidity – 115
See WILL. 3.

ARBITRATION—Compulsory purchase—Street widening — Award — Construction — Alternative findings—Test of value 252
See VENDOR AND PURCHASER.

ARMY—Will—Soldier—Actual military service—Attestation by two witnesses—Gift to one of attesting witnesses—Validity
See WILL. 7. 240

ARRANGEMENT — Scheme of—Alteration of memorandum of association—Altering rights of preference shareholders – 439
See COMPANY. 6.

ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

ASSIGNMENT—Expectant share as one of next of kin of living person—Assignment by way of mortgage—Bankruptcy and discharge of mortgagor before falling into possession of share — Effect on mortgage – – – – – 345
See MORTGAGE.

ASSURANCE.
See under INSURANCE.

ATHLETIC SPORTS—Will—Gift to headmaster for prize in athletic sports – – 284
See CHARITY.

ATTESTATION—Will—Soldier—Actual military service—Attestation by two witnesses—Gift to one of attesting witnesses—Validity – – – – – 240
See WILL. 7.

AWARD.
See under ARBITRATION.

BANK—Licensed English branch of alien enemy bank — Company — English company with alien enemy shareholders—Right of alien to vote at meetings—Intercourse – – – – – 124
See COMPANY. 2.

BANKRUPTCY — Insolvent estate — Transfer from Chancery Division to Court of Bankruptcy – – – – 198
See ADMINISTRATION. 2.

—— Mortgage—Assignment—Bankruptcy and discharge of mortgagor before falling into possession of share — Effect on mortgage – – – – 345
See MORTGAGE.

BATHS AND WASHHOUSES—Public swimming bath—Letting for cinematograph entertainments – – – – 154
See CINEMATOGRAPH.

BELGIUM—Company incorporated in Belgium—War—Trading with the enemy—Right to sue in English Courts—"Enemy"—"Enemy country"—Territory in hostile occupation – – – – 409
See WAR.

BETTERMENT—Compulsory purchase—Street widening — Test of value—Increment value on taking of frontage strip – 252
See VENDOR AND PURCHASER.

BLASPHEMY—Will—Legacy to corporation—Secular Society, Limited—Objects of company — Subversive of religion — Blasphemy—Public policy—Validity of gift – – – – – – 447
See WILL. 2.

BREACH—Master and servant — Contract of service — Breach — Notice of breach to subsequent employer—Continuation of employment after notice of breach of prior contract—Harbouring—Liability of employer – – – – 322
See MASTER AND SERVANT.

CALLS — Company — Guarantee—Call of full amount on two members only—Validity — Proper case for discrimination — Dilatoriness in paying previous calls—Injunction—Declaration of right 233
See COMPANY. 3.

CASES:
—— *Adams* v. *Thrift* – [1915] 1 Ch. 557
Affirmed – – [1915] 2 Ch. 21

CASES—*continued.*

—— *Akerman, In re* – [1891] 3 Ch. 212
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – [1915] 2 Ch. 144
Referred to. *In re* DACRE. WHITAKER *v.* DACRE – – [1915] 2 Ch. 480

—— *Albert Baker & Co.'s Application, In re* [1908] 2 Ch. 86.
Followed. *In re* CADBURY BROTHERS' APPLICATION – [1915] 2 Ch. 307

—— *Allen* v. *Gold Reefs of West Africa* [1900] 1 Ch. 656.
Followed and applied. BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED – – [1915] 2 Ch. 186

—— *Atkinson, In re* – – [1892] 3 Ch. 52
Dictum of North J. in, at p. 54, considered and not followed. *In re* CLARKSON. PUBLIC TRUSTEE *v.* CLARKSON – – [1915] 2 Ch. 216

—— *Attorney-General* v. *Ashton Gas Co.* [1904] 2 Ch. 621; affirmed [1906] A. C. 10.
Principle laid down in, applied. JOHNSTON *v.* CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED [1915] 2 Ch. 338

—— *Attorney-General* v. *Dodd* [1894] 2 Q. B. 150.
Considered. *In re* GOSWELL'S TRUSTS [1915] 2 Ch. 106

—— *Auriferous Properties* (No. 2), *In re* [1898] 2 Ch. 428.
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – [1915] 2 Ch. 144

—— *Baily* v. *British Equitable Assurance Co.* [1904] 1 Ch. 374.
Punt v. *Symons & Co.* [1903] 2 Ch. 506 treated as overruled by. *See* BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED – – [1915] 2 Ch. 186

—— *Bainbridge* v. *Smith* (1889) 41 Ch. D. 462
Distinguished. BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED [1915] 2 Ch. 186

—— *Blake* v. *Lanyon* – (1795) 6 T. R. 221
Followed. FRED. WILKINS AND BROTHERS, LIMITED *v.* WEAVER [1915] 2 Ch. 322

—— *Bodega Co.* v. *Read* – [1914] 2 Ch. 757
Followed. BODEGA COMPANY *v.* MARTIN – – [1915] 9 Ch. 385

—— *Briggs* v. *Hartley* (1850) 19 L. J. (Ch.) 416
Overruled. *In re* BOWMAN. SECULAR SOCIETY, LIMITED *v.* BOWMAN [1915] 2 Ch. 447

—— *Brown & Gregory, In re* – [1904] 1 Ch. 627
Distinguishd. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – [1915] 2 Ch. 144

CASES—*continued.*

—— *Cherry* v. *Boultbee* – (1839) 4 My & Cr. 442
Referred to. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY [1915] 2 Ch. 144
Referred to. *In re* DACRE. WHITAKER *v.* DACRE – – [1915] 2 Ch. 480

—— *Collyer* v. *Isaacs* – (1881) 19 Ch. D. 342
Distinguished. *In re* LIND. INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND – – [1915] 2 Ch. 345

—— *Cowan* v. *Milbourn* – (1867) L. R. 2 Ex. 230
Overruled. *In re* BOWMAN. SECULAR SOCIETY, LIMITED *v.* BOWMAN [1915] 2 Ch. 447

—— *Dearberg* v. *Letchford* (1895) 72 L. T. 489
Not followed. *In re* NUTT'S SETTLEMENT. MCLAUGHLIN *v.* MCLAUGHLIN [1915] 2 Ch. 431

—— *De Francesco* v. *Barnum* (1890) 63 L. T. 514
Followed. FRED. WILKINS AND BROTHERS, LIMITED *v.* WEAVER [1915] 2 Ch. 322

—— *Doering* v. *Doering* – (1889) 42 Ch. D. 203
Referred to. *In re* DACRE. WHITAKER *v.* DACRE – – [1915] 2 Ch. 480

—— *Goy & Co., In re* – – [1900] 2 Ch. 149
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – [1915] 2 Ch. 144

—— *Hailsham Cattle Market Company* v. *Tolman* [1915] 1 Ch. 360.
Affirmed – – [1915] 2 Ch. 1

—— *Harbidge* v. *Warwick* – (1849) 3 Ex. 552
Explained. MALLAM *v.* ROSE [1915] 2 Ch. 222

—— *Hardwicke (Earl of)* v. *Douglas* (1840) 7 Cl. & F. 795.
Discussed. *In re* STOODLEY. HOOSON *v.* LOCOCK – – [1915] 2 Ch. 295

—— *Hearle* v. *Hicks* – (1832) 1 Cl. & F. 20, 24
The rule stated in, followed. *In re* STOODLEY. HOOSON *v.* LOCOCK [1915] 2 Ch. 295

—— *Horne, In re* – – [1905] 1 Ch. 76
Commented upon. *In re* AINSWORTH. FINCH *v.* SMITH – [1915] 2 Ch. 96

—— *Howe* v. *Dartmouth (Earl of)* (1802) 7 Ves. 137, n.
Rule in, referred to. *In re* ROGERS. PUBLIC TRUSTEE *v.* ROGERS [1915] 2 Ch. 437

—— *Huskisson* v. *Lefevre* – (1858) 26 Beav. 157
Considered. *In re* GOSWELL'S TRUSTS [1915] 2 Ch. 106

—— *Illingworth, In re* – [1909] 2 Ch. 297
Approved. *In re* SAFFORD'S SETTLEMENT. DAVIES *v.* BURGESS [1915] 2 Ch. 211

—— *Isaacs, In re* – – [1894] 3 Ch. 506
Followed. *In re* MARLAY. DUKE OF RUTLAND *v.* BURY – [1915] 2 Ch. 264

CASES—*continued.*

—— *Jacubs* v. *Rylance* (1874) L. R. 17 Eq. 341
Referred to. *In re* DACRE. WHITAKER *v.* DACRE – – **[1915] 2 Ch. 480**

—— *Kenward, In re* – (1906) 94 L. T. 277
Distinguished. *In re* HAY. STANLEY GIBBONS, LIMITED *v.* HAY
[1915] 2 Ch. 198

—— *Lawes* v. *Bennett* – (1785) 1 Cox, 167
Explained. *In re* MARLAY. DUKE OF RUTLAND *v.* BURY – **[1915] 2 Ch. 264**

—— *Leeds and Hanley Theatres of Varieties, In re* [1904] 2 Ch. 45.
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – **[1915] 2 Ch. 144**

—— *Lind, In re; Industrials Finance Syndicate, Limited* v. *Lind* [1915] 1 Ch. 744.
Affirmed – – **[1915] 2 Ch. 345**

—— *Monckton's Settlement, In re* [1913] 2 Ch. 636.
Followed. *In re* NUTT'S SETTLEMENT. MCLAUGHLIN *v.* MCLAUGHLIN
[1915] 2 Ch. 431

—— *O'Grady's Settlement, In re* [1915] 1 Ch. 39.
Considered. *In re* GOSWELL'S TRUSTS
[1915] 2 Ch. 106

—— *Prince* v. *Cooper* – (1853) 17 Beav. 187
Referred to. *In re* CROXON. FERRERS *v.* CROXTON – – **[1915] 2 Ch. 290**

—— *Punt* v. *Symons & Co.* – [1903] 2 Ch. 506
Treated as overruled by *Baily* v. *British Equitable Assurance Co.* [1904] 1 Ch. 374. *See* BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED
[1915] 2 Ch. 186

—— *Rhodesia Goldfields, In re* [1910] 1 Ch. 239.
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – **[1915] 2 Ch. 144**

—— *Sykes* v. *Sheard* – (1863) 33 Beav. 114
Considered. *In re* GOSWELL'S TRUSTS
[1915] 2 Ch. 106

—— *Taylor's Settlement, In re* (1852) 9 Hare, 596.
Considered. *In re* GOSWELL'S TRUSTS
[1915] 2 Ch. 106

—— *Thornton* v. *Hawley* – (1804) 10 Ves. 129
Considered. *In re* GOSWELL'S TRUSTS
[1915] 2 Ch. 106

—— *Tongue, In re; In re Burton; Higginson* v. *Burton* [1915] 1 Ch. 390.
Affirmed – – **[1915] 2 Ch. 283**

—— *Tubbs, In re; Dykes* v. *Tubbs* [1915] 1 Ch. 540.
Approved as to the construction of the will, but reversed on the ground that the Court had power under the Settled Land Act to allow the costs out of capital notwithstanding the will.
[1915] 2 Ch. 137

CASES—*continued.*

—— *Turnbull, In re* – [1905] 1 Ch. 726
Referred to. *In re* SNAPE. ELAM *v.* PHILLIPS – – **[1915] 2 Ch. 179**

—— *United London and Scottish Insurance Company, Limited, In re. Brown's Claim* [1915] W. N. 76.
Reversed – – **[1915] 2 Ch. 167**

—— *United London and Scottish Insurance Company, In re. Newport Navigation Company's Claim*, [1915] 1 Ch. 578.
Affirmed – – **[1915] 2 Ch. 12**

—— *West Coast Gold Fields, In re* [1905] 1 Ch. 597.
Distinguished. *In re* PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED – – **[1915] 2 Ch. 144**

—— *York, In re* – (1887) 36 Ch. D. 233
Distinguished. *In re* HAY. STANLEY GIBBONS, LIMITED *v.* HAY
[1915] 2 Ch. 198

CHARITY—*School—Will—Charitable Gifts—Validity—Gift to Governing Body of School for building Fives Courts—Gift to Headmaster for Prize in School Athletic Sports — Statute of Elizabeth*, 43 *Eliz. c.* 4.

By his will a testator bequeathed "1000*l.* to the Governing Body of Aldenham School for the purpose of building Eton fives courts or squash racket courts, or for some similar purpose that shall be decided by a majority of the house masters at the time of my death"; and "100*l.* to the headmaster for the time being of Aldenham School, upon trust to use the interest to provide a prize for some event in the school athletic sports every year agreed upon by the committee of the athletic sports."

Aldenham School was originally founded as a free grammar school and was admittedly a charity within the Statute of Elizabeth. There were 208 boys in the school between the ages of ten and nineteen and almost all boarders:—

Held, that both legacies were valid charitable bequests, it being essential in a school of learning of this description that there should be organized games as part of the daily routine. *In re* MARIETTE. MARIETTE *v.* GOVERNING BODY OF ALDENHAM SCHOOL – **Eve J. 284**

CINEMATOGRAPH—*Public Swimming Bath—Closing during Winter Months—Letting for Cinematograph Entertainments—Local Government—Baths and Washhouses Act*, 1878 (41 *&* 42 *Vict. c.* 14), *ss.* 5, 6, 7, 8—*Baths and Washhouses Act*, 1896 (59 *&* 60 *Vict. c.* 59), *s.* 2.

Under s. 5 of the Baths and Washhouses Act, 1878, the defendant corporation, as the authority for administering the Baths and Washhouses Acts, 1846 to 1899, in their borough, had power during such period, not exceeding five months in any one year, as they should think fit, from November to March inclusive, to close their public swimming bath and to either keep the same closed or establish therein a gymnasium or such other means of healthful recreation as they should think fit, or during such period allow the same to be used as an empty building for such

CINEMATOGRAPH—*continued.*

purposes of healthful recreation or exercise as they should think fit. By a proviso to s. 5 no covered or open swimming bath, when closed, might be used for music or dancing.

Sect. 2 of the Baths and Washhouses Act, 1896, repealed the proviso to s. 5 of the Act of 1878, and enacted (*a*) that before any closed bath could be used for music or dancing a licence must be obtained; and (*b*) that no portion of the premises in respect of which a licence was granted should be let "otherwise than occasionally," and that no money for admission be taken at the doors.

The corporation closed their swimming bath and let it during the winter months to W. for the purpose of a cinematograph exhibition, having first erected therein a substantial cement operating box and laid over the bath a floor upon which partially fixed seating accommodation was placed. W. then carried on cinematograph performances in the building, and employed a "musical director" to play appropriate accompaniments to the scenes which were exhibited, and took money for admission at the doors. Licences for music and for cinematograph exhibitions were obtained by the corporation from the London County Council.

In an action by the Attorney-General, at the relation of ratepayers of the borough, for a declaration that the letting to W. was contrary to the provisions of the Baths and Washhouses Acts and ultra vires the corporation:—

Held by the Court of Appeal, affirming the decision of Joyce J., that the performance given in the building was such that a music licence was required; that the music was not merely accessory to but a substantial part of the performance; that proviso (*b*) to s. 2 of the Act of 1896 therefore applied; that what the corporation had done was not merely allowing the bath to be used as an empty building; that the prohibition against letting otherwise than occasionally and against taking money at the doors had been infringed; and that on all these grounds the plaintiffs were entitled to the declaration which they claimed. ATTORNEY-GENERAL (HOXTON CINEMA, LIMITED) *v.* SHOREDITCH CORPORATION – – – – **C. A. 154**

CODICIL—Construction—Residuary bequest in will — Bequest in codicil of "the residue of my estate not bequeathed by the above will" – – – **295**
See WILL. 1.

COMPANY—*Contract by which a Shareholder has Power to nominate a Director—Article of Association to same Effect—Power of Company to alter Article—Specific Performance—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

By an agreement binding on the defendant company it was provided that so long as the plaintiff syndicate should hold 5000 shares in the defendant company the plaintiff syndicate should have the right of nominating two directors on the board of the defendant company. A clause to the same effect was contained in article 88 of the defendant company's articles

COMPANY—*continued.*

of association. Another article provided that the number of directors should not be less than three nor more than seven. The plaintiff syndicate had recently nominated two persons as directors. The defendant company objected to these persons as directors and refused to accept the nomination, and a meeting of the shareholders was called for the purpose of passing a special resolution under the Companies (Consolidation) Act, 1908, s. 13, cancelling article 88:—

Held, that the defendant company had no power to alter its articles of association for the purpose of committing a breach of contract and that an injunction ought to be granted to restrain the holding of the meeting for that purpose.

Allen v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 followed and applied.

Punt v. *Symons & Co.* [1903] 2 Ch. 506 treated as overruled by *Baily* v. *British Equitable Assurance Co.* [1904] 1 Ch. 374.

Held, also, that the contract was not incapable of being specifically enforced, and that a declaration ought to be made that the two persons nominated by the plaintiff syndicate became and were directors of the defendant company with ancillary relief by way of injunction if it became necessary.

Bainbridge v. *Smith* (1889) 41 Ch. D. 462 distinguished. BRITISH MURAC SYNDICATE, LIMITED *v.* ALPERTON RUBBER COMPANY, LIMITED – – – – **Sargant J. 186**

2. —— *English Company with Alien Enemy Shareholders—Right of Alien to vote at Meetings — Licensed English Branch of Alien Enemy Bank—Intercourse—Trading with the Enemy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 87), *s.* 1, *sub-s.* 2—*Trading with the Enemy Proclamation, No.* 2, *clause* 6.

During a state of war an alien enemy is not entitled to exercise a right of voting in respect of shares in an English company, but the right is suspended during the war.

The Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, No. 2, are not exhaustive in the sense that anything not expressly prohibited by them must be taken as permitted. Inquiry must still be made whether acts not therein mentioned are prohibited by the common law or by statute, and by common law not only commercial intercourse but all intercourse with an alien enemy is prohibited.

Where an alien enemy bank, which is a shareholder in an English company, cannot vote in respect of its shares, a branch of the bank locally situated in England is not within the proviso in clause 6 of the Trading with the Enemy Proclamation, No. 2, and cannot exercise the right of voting, although it holds a licence from the Secretary of State under the Aliens Restriction (No. 2) Order in Council and the Aliens Restriction Act, 1914, which is silent on the subject of voting.

Decision of Sargant J. affirmed. ROBSON *v.* PREMIER OIL AND PIPE LINE COMPANY, LIMITED – – – – – **C. A. 124**

3. —— *Guarantee—Liability of Members to contribute Additional Sum — Call of Full Amount on Two Members only — Validity—Proper Case for Discrimination—Dilatoriness in paying Previous Calls—Injunction—Declaration of Right.*

The articles of association of a company limited by guarantee provided that each member should be liable to contribute and should when demanded pay to the committee any sum or sums not exceeding in the aggregate the sum of 100*l.* (therein called the contribution) in addition to any liability in case of winding up under the guarantee clause in the memorandum, and that the committee might from time to time make such calls as they thought fit upon each member in respect of all moneys unpaid on his contribution, and that each member should pay the amount of every call so made upon him as appointed by the committee. Two members of the society had for some time past objected to the policy of the committee and had been dilatory in the payment of two small calls. A third call of 10*l.* made in June, 1914, was also unpaid by them. In this state of things in March, 1915, the committee passed a resolution calling up the entire uncalled balances of the contributions of these two members alone, the reason alleged being their refusal to pay the previous calls, and the trouble and expense thereby incurred and likely to be incurred by the society :—

Held, assuming the committee had power under the articles in a proper case to make calls on certain members without making similar calls on the other members, that no sufficient reason had been shown for the exercise of that power against the two members in question, and that the resolution was invalid.

Quaere, whether under the articles the committee had any power to make calls on certain members without making similar calls on other members. GALLOWAY *v.* HALLÉ CONCERTS SOCIETY – – – – **Sargant J. 233**

4. —— *Manager—Remuneration by a Percentage on Annual Net Profits—Prior Deduction of Income Tax—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 54.

By a clause in an agreement between a company and its manager he was to receive a fixed salary, and also, as soon as the profits for the year had been ascertained and certified by the company's auditors, a percentage of "the net profits (if any) of the company for the whole year." The agreement provided as follows: "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries" and other items, which did not include certain items which would be deducted before arriving at the net profits or the income tax payable by the company.

The balance-sheet for one year showed a certain amount of profits including the income tax payable by the company, and the auditors gave a special certificate that the percentage payable to the manager was calculated on the amount of profits less income tax :—

Held, (1.) on the principle laid down in *Attorney-General* v. *Ashton Gas Co.* [1904] 2 Ch. 621 (affirmed [1906] A. C. 10), that the income tax was part of the net profits available for dividends, and that the manager was entitled to be paid his percentage on the net profits before deduction of the tax; and (2.) that, the certificate being based on a wrong principle, the Court was not bound by it. JOHNSTON *v.* CHESTERGATE HAT MANUFACTURING COMPANY, LIMITED – – – – **Sargant J. 338**

5. —— *Prospectus — Misrepresentations—Directors—Liability—Reasonable Ground for believing Statements to be true—Uncorroborated Statements of Promoter—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 84, *sub-s.* 1 (*a*).

In an action by a shareholder against the directors of a company, to recover compensation for misrepresentations contained in the prospectus signed and issued by them, on the faith of which he had taken shares :—

Held, that the uncorroborated statements of the vendor to and promoter of the company afforded by themselves no "reasonable ground" for believing those statements to be true, and the directors were therefore not entitled to the protection of s. 84, sub-s. 1 (*a*), of the Companies (Consolidation) Act, 1908.

Decision of Eve J. [1915] 1 Ch. 557 affirmed. ADAMS *v.* THRIFT – – – – **C. A. 21**

6. —— *Scheme of Arrangement—Alteration of Memorandum of Association—Altering Rights of Preference Shareholders—Alterations not involving Consolidation of Shares of different Classes or Division of Shares into different Classes—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

A scheme of arrangement which modifies the memorandum of association of a company in any way other than those specified in s. 45 of the Companies (Consolidation) Act, 1908, does not require a special resolution passed by the majority mentioned in that section, but may be validly effected under s. 120 of that Act. *In re* J. A. NORDBERG, LIMITED – **Neville J. 439**

7. —— *Winding-up—Insolvent Shareholder indebted to Company—Executor's Right to share in Surplus Assets subject to setting off the Dividend only on the Debt.*

A company incorporated under the Companies Acts, 1862 to 1900, and whose articles of association did not give it any lien on its fully-paid shares for the debt of the holder thereof, went into voluntary winding up on July 15, 1914. Fully-paid shares in the company formed part of the estate of A., who died in 1908, insolvent. A judgment for administration in an action by a creditor of the testator was made in 1909, and the Master by his certificate found the company to be a creditor for 2633*l.*, in which A. had become a debtor to the company. In the winding-up there were surplus assets distributable among the fully-paid shareholders of the com-

COMPANY—*continued.*

pany. The liquidator conceded that there was no set-off within the language of the Statute of Set-off, and that the case was not one of mutual dealings so as to raise any question of set-off under s. 38 of the Bankruptcy Act, 1883; but he contended that the case was within the broader principle—enunciated in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442, and given effect to in *In re Akerman* [1891] 3 Ch. 212, and a series of subsequent cases—that where a person entitled to participate in a fund was also bound to make a contribution in aid of that fund, he could not be allowed to participate unless and until he had fulfilled his duty to contribute; and that the executors of A. were bound to pay the liquidator the full amount of the 2633*l.* as a term of receiving a share in the company's surplus assets:—

Held, affirming the decision of Sargant J. [1915] 2 Ch. 144, that the liquidator was not entitled to retain the testator's share in surplus assets against more than the proper dividend on the ascertained debt.

In re PERUVIAN RAILWAY CONSTRUCTION COMPANY, LIMITED - - - **C. A. 442**

8. —— *Winding-up—Landlord and Tenant—Rent payable in advance—Distress for Rent before Commencement of Winding-up—Injunction.*

A company was tenant of premises at a yearly rent payable in advance. The lessor distrained before the commencement of the winding up of the company for a year's rent in advance that had accrued due:—

Held, that the fact that the rent was payable in advance was not a special reason for restraining the lessor from proceeding with his distress.

Decision of Neville J. affirmed.

VENNER'S ELECTRICAL COOKING AND HEATING APPLIANCES, LIMITED *v.* THORPE **C. A. 404**

—— Company incorporated in Belgium—War—Trading with the enemy—Right to sue in English Courts — "Enemy" — "Enemy country"—Territory in hostile occupation - - - - **409**
See WAR.

—— Insurance company—Winding-up order—Subsequent fire—Total loss—Rights of assured - - - - - **12**
See INSURANCE.

COMPENSATION — Election — Spinster — Restraint on anticipation - - **283**
See ELECTION.

COMPILATION—Copyright—Index of stations to railway guide—Monthly publication—Infringement - - - **376**
See COPYRIGHT.

COMPULSORY PURCHASE—Street widening—Arbitration — Award — Construction
See VENDOR AND PURCHASER. **252**

CONTRACT—Company.
See under COMPANY.

CONTRACT OF SERVICE—Master and servant—Breach — Harbouring — Liability of employer - - - - - **322**
See MASTER AND SERVANT.

CONVERSION—*Deed of Family Arrangement—Conveyance of Freeholds to Trustees—Trust to sell upon Request in Writing of Settlors—Trust of Rents and Profits until Sale for Settlors, their Heirs, Executors, Administrators and Assigns—Death of one of Settlors intestate—No Request to sell in Lifetime—Freeholds, whether converted into Money.*

By a deed of family arrangement dated in 1910, and made between A. G. of the first part, H. G. of the second part, W. E. G. of the third part, and the said H. G. and W. E. G. and B. W. as trustees of the fourth part, the parties thereto of the first, second, and third parts, for the purpose of settling certain questions which had arisen, conveyed and assigned certain freehold and leasehold hereditaments to the trustees, and it was thereby provided that the trustees should, "upon the request in writing of the parties hereto of the first, second, and third parts respectively," sell the freehold and leasehold hereditaments and premises respectively thereby conveyed and assigned and should stand possessed of the residue of the moneys to arise from such sale after payment of costs, and also of the rents and profits of the said hereditaments and premises or such part thereof as should not be sold, and until the sale thereof in trust for the parties thereto of the first, second, and third parts respectively, their heirs, executors, administrators and assigns, in equal shares as tenants in common. In 1914 H. G. died intestate. Some of the properties had been sold in his lifetime, but no request had been made to the trustees to sell the properties remaining unsold at his death:—

Held, that the real estate comprised in the deed and remaining unsold retained its character of real estate and had not been converted in equity into money.

Huskisson v. *Lefevre* (1858) 26 Beav. 157; *Sykes* v. *Sheard* (1863) 33 Beav. 114; *Thornton* v. *Hawley* (1804) 10 Ves. 129; *Attorney-General* v. *Dodd* [1894] 2 Q. B. 150; *In re O'Grady's Settlement* [1915] 1 Ch. 30; and *In re Taylor's Settlement* (1852) 9 Hare, 596, considered. *In re* GOSWELL'S TRUSTS - - **Younger J. 106**

—— Will—Construction—Devise of real estate in Ireland—Irish Land Acts - **264**
See IRELAND.

—— Will—Tenant for life and remainderman—Unauthorized investments held at testator's death—Right of tenant for life to income in specie - - - **437**
See WILL. 9.

CONVEYANCE — Conveyance of freeholds to trustees—Conversion—Deed of family arrangement—Trust to sell upon request in writing of settlors—Trust of rents and profits until sale for settlors, their heirs, executors, administrators and assigns—Death of one of settlors intestate—No request to sell in lifetime—Freeholds, whether converted into money - **106**
See CONVERSION.

COPYRIGHT—*Compilation—Index of Stations to Railway Guide—Monthly Publication—Infringement—Copyright Act*, 1911 (*1 & 2 Geo.* 5, *c.* 46), *ss.* 1, 2, 7, 35.

The plaintiffs were the proprietors of the monthly publication known as Bradshaw's Guide, being a compilation of the current timetables of the various railways in the United Kingdom, and having an alphabetical index to all the stations, many thousands in number, that were mentioned, with references to the pages where the names would be found. In this action the plaintiffs sued only in respect of their copyright in the monthly numbers published in and subsequent to January, 1903.

In 1914 the defendants, for the purpose of a prize competition arranged in connection with their journal, *Pearson's Weekly*, required to have a printed list, which could be purchased by competitors and the public, of the names of all the railway stations in the United Kingdom. Having partially made up such a list from other sources, they completed it by copying from the index to the current number of Bradshaw's Guide the names of some hundreds of stations, most of which, however, appeared in the index to the numbers published prior to 1903. The defendants then printed this list and sold a large number of copies at a profit under the title of "List of Railway Stations for use in *Pearson's Weekly* Great Picture Contest," thereby, as the plaintiffs contended, infringing their copyright in the current number of Bradshaw's Guide. The defendants contended that in so far as it reproduced old matter the number of Bradshaw's Guide for January, 1914, was merely a new edition of the Guide for 1902, and that they had not copied any substantial part of the Guide for January, 1914:—

Held, that the index to the numbers of Bradshaw's Guide for 1914 was not a new edition, in the sense in which that phrase was used in copyright law, of the index to Bradshaw's Guide for 1902, but was an index to a new and different work in which the plaintiffs were entitled to copyright; that the defendants had infringed the copyright of the plaintiffs; and that the plaintiffs were entitled to recover damages. H. BLACKLOCK & CO., LIMITED *v.* C. ARTHUR PEARSON, LIMITED – – **Joyce J. 376**

COSTS—*Taxation — Plaintiff's Solicitors' Bill reduced by One-sixth—"Fund or estate (real or personal)"—Action for Indemnity by Trustee—Rules of the Supreme Court*, 1883, *Order LXV., r.* 27, *sub-r.* 38B.

A trustee of leasehold property, on which at the request of his cestuis que trust he had created incumbrances involving a personal liability on his part, brought this action claiming to be indemnified by them personally and also out of the property. By the order made in the action the Court declared that the plaintiff was entitled to be indemnified out of the property against his personal liability and costs, including the costs of the action, and gave the plaintiff liberty to apply for giving effect to his indemnity, if not completed within six months, and directed taxation of the plaintiff's costs. The plaintiff's solicitors' bill was reduced on taxation by more than one-sixth, and the taxing Master, holding that the case fell within the provisions of Order LXV., r. 27, sub-r. 38B, disallowed the solicitors their costs of drawing and copying the bill and of attending the taxation. On a summons to review:—

Held, that the plaintiff's costs were not payable out of a "fund or estate (real or personal)" within the meaning of sub-r. 38B, and that the taxing Master was wrong in disallowing these costs. BUCHAN *v.* AYRE – **Sargant J. 474**

COSTS—*continued.*

—— Trustees' costs of management—Equitable tenant for life and remainderman—Freehold houses let on long repairing leases at ground rents—Costs of survey for repairs and of serving notices to repair – – – – – **137**
See SETTLED LAND.

CRIMINAL LAW — Lunatics, Trial of — Intestacy—Verdict of inquest that son murdered intestate — Indictment for murder — Insanity — Indictment not proceeded with — Right to share in father's estate – – – – **173**
See INTESTACY.

CUSTODIAN—Enemy property—Policies of life assurance deposited with enemy as security—Policies out of jurisdiction—Application to vest policies or right to receive policy moneys in custodian **313**
See TRADING WITH THE ENEMY.

DECLARATION OF RIGHT — Company — Guarantee—Call of full amount on two members only—Validity—Proper case for discrimination—Dilatoriness in paying previous calls—Injunction – **233**
See COMPANY. 3.

DEED—*Construction of Deed—Settlement to Use of Trustees and their Heirs—Trusts in favour of A. B. for life—Remainder to the Use of her Children as she should by Deed appoint—Appointment of "trust funds and property" without Words of Limitation—Intention to be found in Document—Absolute Interest.*

By a settlement land was assured to the use of trustees and their heirs upon certain trusts during the life of A. B. and after her death to the use of her children as she should by deed appoint. By a deed poll A. B. appointed that the trustees should after her death hold "the trust funds and property" in trust for her four sons in equal shares without words of limitation. At the date of the appointment some of the land had been sold and the property consisted partly of land and partly of money subject to a trust for investment in land:—

Held, (1.) that the appointees took equitable and not legal estates; (2.) that though the gift by deed of an equitable estate in land without words of limitation passes only a life estate, the fee may pass if there is to be found in the construction of the deed as a whole an intention that it should pass, and that such an intention is shown by the fact that a gift of land is coupled

DEED—*continued.*

with a gift of money subject to a trust for investment in land which will pass absolutely without words of limitation.

In re Monckton's Settlement [1913] 2 Ch. 636 followed.

Dearberg v. *Letchford* (1895) 72 L. T. 489 not followed. *In re* NUTT'S SETTLEMENT. MCLAUGHLIN *v.* MCLAUGHLIN **Neville J. 431**

DEED OF FAMILY ARRANGEMENT — Conversion—Conveyance of freeholds to trustees—Trust to sell upon request in writing of settlors—Trust of rents and profits until sale for settlors, their heirs, executors, administrators and assigns—Death of one of settlors intestate—No request to sell in lifetime—Freeholds, whether converted into money – **106**
See CONVERSION.

DELEGATION—Power of appointment—Special power—Exercise—Invalidity – **115**
See WILL. 3.

DIRECTORS—Company—Contract by which a shareholder has power to nominate a director – – – – – **186**
See COMPANY. 1.

—— Company—Prospectus — Misrepresentation — Liability — Uncorroborated statements of promoter – – – **21**
See COMPANY. 5.

DISCLAIMER—Trade mark—Label – **307**
See TRADE MARK. 1.

DISTRESS—Company—Winding-up— Landlord and tenant—Rent payable in advance—Distress for rent before commencement of winding-up—Injunction – **404**
See COMPANY. 8.

DISTURBANCE—Market – Statutory market **1**
See MARKET.

DUTY—Inland Revenue.
See under REVENUE.

—— Legacy duty on life interest—Administration—Bequest to special trustees of legacy settled on persons in succession — Different rates of duty — Duty wrongly paid out of capital of legacy by executors beneficially entitled—Recoupment by tenant for life – **96**
See ADMINISTRATION 1.

EASEMENT—Light.
See under LIGHT.

ELECTION—*Compensation—Spinster—Restraint on Anticipation.*

The doctrine of election applies in the case of a spinster to whom an interest with a restraint on anticipation during coverture is given by the same instrument as that which gives rise to the question of election.

Decision of Warrington J. [1915] 1 Ch. 390 affirmed.

In re TONGUE. *In re* BURTON. HIGGINSON *v.* BURTON – – – – – **C.A. 283**

EMPLOYER AND SERVANT — Restraint of trade—Special branch of engineering business — Employer and servant — Restraint for seven years extending to United Kingdom—Interests of servant and public – – – – **57**
See RESTRAINT OF TRADE.

ENEMY—Alien enemy shareholders—Company —English company with alien enemy shareholders—Right of alien to vote at meetings—Licensed English branch of alien enemy bank—Intercourse – **124**
See COMPANY. 2.

—— Trading with the enemy.
See under TRADING WITH THE ENEMY.

ENEMY PROPERTY—Policies of life assurance deposited with enemy as security—Policies out of jurisdiction – – **313**
See TRADING WITH THE ENEMY.

ENGINEERING BUSINESS—Special branch of —Employer and servant – – **57**
See RESTRAINT OF TRADE.

ESTATE DUTY.
See under REVENUE.

ESTATE TAIL — Will — Construction — Real estate—Devise to A. "or his issue"—Words of limitation not of substitution
See WILL. 4. **301**

EXECUTION — Power of appointment—Power to wife to appoint by will during the continuance of the coverture — Will made during husband's lifetime—Death of husband leaving wife surviving—Valid execution – – – **211**
See POWER OF APPOINTMENT. 1.

EXECUTOR — Company — Executors' right to share in surplus assets subject to setting off the dividend only on the debt **442**
See COMPANY. 7.

FAMILY ARRANGEMENT—Deed of—Conversion—Conveyance – – – **106**
See CONVERSION.

FINANCE ACTS.
See under REVENUE.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FIVES COURTS — Will — Charitable gifts — Validity—Gift to governing body of school for building fives courts – **284**
See CHARITY.

GAS—Insurance (Accident) — Policy — Exceptions—Construction limited to context —Involuntary inhalation of gas – **167**
See INSURANCE (ACCIDENT).

GIFT — Will — Validity of gift — Legacy to corporation—Secular Society, Limited —Objects of company—Subversive of religion—Blasphemy—Public policy
See WILL. 2. **447**

GUARANTEE—Company—Call of full amount on two members only — Validity — Proper case for discrimination — Dilatoriness in paying previous calls—Injunction—Declaration of right **233**
See COMPANY. 3.

HARBOURING—Master and servant—Contract of service—Breach—Notice of breach to subsequent employer—Continuation of employment after notice of breach of prior contract—Liability of employer
See MASTER AND SERVANT. **322**

HUSBAND AND WIFE — Power of appointment.
See under POWER OF APPOINTMENT.

IN SPECIE—Tenant for life and remainderman —Right of tenant for life to income in specie – – – – – **437**
See WILL. 9.

INCOME—Will—Tenant for life and remainderman — Conversion — Unauthorized investments held at testator's death—Right of tenant for life to income in specie – – – – – **437**
See WILL. 9.

INCOME TAX — Company — Manager — Remuneration by a percentage on annual net profits—Prior deduction of income tax – – – – – – **338**
See COMPANY. 4.

INCREMENT VALUE—on taking of frontage strip — Betterment — Compulsory purchase—Street widening—Test of value
See VENDOR AND PURCHASER. **252**

INDEMNITY — Costs — Taxation — Plaintiff's solicitors' bill reduced by one-sixth—"Fund or estate (real or personal)"—Action for indemnity by trustee – **474**
See COSTS.

INFRINGEMENT—Copyright.
See under COPYRIGHT.

INJUNCTION—Company — Guarantee—Call of full amount on two members only—Validity—Proper case for discrimination —Dilatoriness in paying previous calls —Declaration of right – – **233**
See COMPANY. 3.

—— Company — Winding-up — Landlord and tenant — Rent payable in advance — Distress for rent before commencement of winding-up—Injunction – – **404**
See COMPANY. 8.

INLAND REVENUE.
See under REVENUE.

INSANITY.
See under LUNACY

INSOLVENT ESTATE—Administration—Transfer from Chancery Division to Court of Bankruptcy – – – – **198**
See ADMINISTRATION. 2.

INSOLVENT SHAREHOLDER — Company — Winding-up—Insolvent shareholder indebted to company—Executors' right to share in surplus assets subject to setting off the dividend only on the debt – – – – – **442**
See COMPANY. 7.

INSURANCE—*Marine Insurance—Fire Insurance—Policy limited to Fire only, including General Average and Salvage Charges resulting therefrom — Insurance Company — Winding-up Order—Subsequent Fire—Total Loss—Rights of Assured—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 1—4, 23, 30, 53, 65, 66—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 17, 28; *Scheds. VI., VIII.*

A policy insuring a ship while on the Great Lakes "against the risk of fire only, including general average and salvage charges resulting therefrom," was drawn in such a form that it was doubtful whether it was a marine policy limited to fire, or a fire policy with marine incidents contractually attached. The ship was totally destroyed by fire a few days after the winding up of the insurance company:—

Held, on the construction of the policy, that it was a fire policy within the Assurance Companies Act, 1909, and that the assured could only prove for the unexpired portion of the premium.

Decision of Astbury J. [1915] 1 Ch. 578 affirmed. *In re* UNITED LONDON AND SCOTTISH INSURANCE COMPANY. NEWPORT NAVIGATION COMPANY'S CLAIM – – **C. A. 12**

INSURANCE (ACCIDENT) — *Policy — Exceptions — Construction — Exception of Accident caused by (inter alia) "anything swallowed, or administered, or inhaled"—Construction limited by Context—Involuntary Inhalation of Gas.*

An accident policy excepted liability in the case of death or disablement by accident caused (inter alia) "by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled":—

Held, that the context was not sufficient to confine the exception to voluntary inhalation; and that a death resulting from the accidental and involuntary inhalation of ordinary coal gas was within the exception.

Decision of Astbury J. [1915] W. N. 76 reversed. *In re* UNITED LONDON AND SCOTTISH INSURANCE COMPANY, LIMITED. BROWN'S CLAIM – – – – – – **C. A. 167**

INSURANCE (FIRE)—Policy—Insurance company—Winding-up order—Subsequent fire—Total loss—Rights of assured **12**
See INSURANCE.

INSURANCE (LIFE)—Enemy property—Policies of life assurance deposited with enemy as security —Policies out of jurisdiction
See TRADING WITH THE ENEMY. **313**

INSURANCE (MARINE) — Fire insurance — Policy limited to fire only, including general average and salvage charges resulting therefrom — Insurance company—Winding-up—Subsequent fire—Total loss—Rights of assured – **12**
See INSURANCE.

INTEREST—Money-lender—Transaction harsh and unconscionable—Excessive interest—Interest on interest—Payment by instalments—Default clause – – **330**
See MONEY-LENDER.

INTESTACY—*Verdict of Inquest that Son murdered Intestate — Indictment for Murder—Insanity—Indictment not proceeded with—Right to share in Father's Estate—Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38), *s.* 2.

A coroner's inquisition having found that a man murdered his brother and father, he was tried and convicted on an indictment for the murder of the brother, but was found to be insane when he committed the act, and was ordered to be detained as a criminal lunatic. An indictment for the murder of the father was thereupon not proceeded with :—

Held, that he was not prevented from taking a share under his father's intestacy. *In re* HOUGHTON. HOUGHTON *v.* HOUGHTON
Joyce J. 173

INVESTMENTS — Will — Tenant for life and remainderman — Conversion — Unauthorized investments held at testator's death—Right of tenant for life to income in specie – – – **437**
See WILL. 9.

IRELAND—*Will—Devise of Real Estate in Ireland—Irish Land Acts—Contracts with Tenants for Sale of Holdings entered into by Testator before Date of Will—Sanction of Land Commission not obtained before Death of Testator—Conversion—Incidence of Estate Duty—Will—Construction—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 4 ; *s.* 9, *sub-ss.* 1, 5—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 31, *sub-ss.* 1, 8 — *Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 16.

Testator by his will dated in 1911 (clause 9) devised his W. estates to B. absolutely, and provided (clause 10) that if after the date of his will and prior to his death he should receive (either personally or by payment to any person or persons, or to any bank or company, or into Court on his behalf) any capital moneys in respect of the sale of his W. estates or any part or parts thereof, or if at his death any moneys should be owing to him and subsequently paid in respect of any such sale or sales and which did not pass under the devise and bequest thereinbefore contained, then he bequeathed to B. for his own use and benefit a legacy equal in amount in the aggregate of the net capital moneys so received by or owing to him. The testator bequeathed his residuary personal estate in trust for the person who would at his death have been entitled thereto under the Statute of Distributions if he had died intestate, and who

IRELAND—*continued.*

in subsequent proceedings was ascertained to be R.

Prior to the date of his will in some instances and to that of a codicil confirming his will in others the testator had entered into certain contracts with the tenants of the W. estates for the sale to them of their respective holdings under the Irish Land Act, 1903, in the form provided by the Act, which were subject to the sanction of the Land Commissioners being given to them. At his death in 1912 this sanction had not been obtained :—

Held, that there had been no conversion of the W. estates, but that they passed to B. as real estate under clause 9 of the will and not as a legacy of the proceeds of sale of real estate under clause 10.

Held, also, that B. was entitled to the W. estates for an estate in fee simple defeasible on the sanction of the Land Commissioners being given ; and that such sanction when given would operate to convert the real estate into personal estate as from its date.

Held, therefore, that on the testator's death the W. estates did not vest in the executors "as such," and that the estate duty was a charge on the land itself and was not payable out of the testator's residuary personal estate.

Held, further, that there was nothing in the Irish Land Acts to alter that position, except that if and when the purchases were completed the charge would be shifted from the land to the purchase-money, or (in other words) the estate duty would be payable out of that which represented the land and not out of the residuary personal estate.

Lawes v. *Bennett* (1785) 1 Cox, 167 explained.
In re Isaacs [1894] 3 Ch. 506 followed.
Decision of Eve J. reversed. *In re* MARLAY. DUKE OF RUTLAND *v.* BURY – – **C. A. 264**

JOINT TENANCY — Will — Construction—Substitutional gift — Children "shall be paid" parent's share—Joint tenancy or tenancy in common – – – **216**
See WILL. 8.

LABEL—Trade mark—Disclaimer.
See TRADE MARK.

LAND COMMISSION — Will — Devise of real estate in Ireland—Irish Land Acts—Sanction of Land Commission not obtained before death of testator—Conversion – – – – – **264**
See IRELAND.

LANDLORD AND TENANT—Company—Winding-up — Rent payable in advance—Distress for rent before commencement of winding-up—Injunction – – **404**
See COMPANY. 8.

LANDS CLAUSES ACT—Compulsory purchase—Street widening — Arbitration—Award — Construction — Alternative findings —Test of value – – – – **252**
See VENDOR AND PURCHASER.

LEASE—Licensed premises—Revenue—Increase of duty—Apportionment—Liability of grantor to pay proportion of increased duty—"Grantor of lease" – – **385**
See REVENUE.

LEGACY—Will.
See under WILL.

LEGACY DUTY.
See under REVENUE.

LICENSED PREMISES—Revenue—Increase of duty — Apportionment — Lease—Liability of grantor to pay proportion of increased duty—"Grantor of lease" **385**
See REVENUE.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT—*Enjoyment—Interruption—Easement—Tenancy of Dominant Tenement under Person occupying Servient Tenement—Verbal Agreement of Tenancy—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

During the period relied on by persons claiming the right of access of light to windows in the alleged dominant tenement, a person had, for more than the time required to render that period insufficient to establish an easement of light under the Prescription Act, 1832, been the yearly tenant of the rooms in that tenement lighted by the windows under a verbal agreement with a person who was also during the tenancy the occupier of the servient tenement:—

Held, that, as the tenancy was only verbal, the access of light during its continuance was not "enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing," as required by s. 3 of the Act, and that the existence of the tenancy did not prevent the owners of the dominant tenement from acquiring the right to the access of light through the windows.

Harbidge v. *Warwick* (1849) 3 Ex. 552 explained. MALLAM *v.* ROSE – **Sargant J. 222**

LIMITATION—Will—Construction—Real estate—Devise to A. "or his issue"—Estate tail—Words of limitation not of substitution – – – – – **301**
See WILL. 4.

LIMITATION, WORDS OF—Deed, Construction of—Settlement to use of trustees and their heirs — Appointment of "trust funds and property" without words of limitation—Intention to be found in document—Absolute interest – **431**
See DEED.

LOCAL GOVERNMENT—Baths and washhouses
See under BATHS AND WASHHOUSES.

LUNACY—Intestacy—Verdict of inquest that son murdered intestate—Indictment for murder — Insanity — Indictment not proceeded with — Right to share in father's estate – – – – **173**
See INTESTACY.

MANAGER — Company — Remuneration by a percentage on annual net profits — Prior deduction of income tax – **338**
See COMPANY. 4.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARKET — *Statutory Market — Disturbance—Exception in case of Sales "on any land or in any building belonging" to a Seller "or in his occupation"—Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.

By a private Act, passed in 1871, incorporating certain statutes, including the Markets and Fairs Clauses Act, 1847 (except where expressly varied by the private Act), the plaintiffs were incorporated, the limits of operation of the Act were defined, and the company were empowered to continue, establish, and maintain a market for the sale of certain animals. By s. 42 every person who should, on the days appointed for holding markets, within the limits of the Act sell or expose for sale at any place within those limits, "except on any land or in any building belonging to him or in his occupation," any animals, in respect of which tolls were by the Act authorized to be taken, should forfeit and pay to the company any sum not exceeding forty shillings, unless he should have paid the tolls authorized. By s. 13 of the Act of 1847, after the market place of a market under a special Act is opened for public use, every person other than a licensed hawker who sells or exposes for sale in any place within the prescribed limits "except in his own dwelling-place or shop" any articles in respect of which tolls are by the special Act authorized to be taken in the market is for every offence liable to a penalty not exceeding forty shillings. The plaintiffs' markets were held on every alternate Wednesday, and sales took place there both by auctioneers and through private bargains by the frequenters of the market. The defendant acquired and occupied land within the limits of the private Act, on which he erected buildings which were used for animals in respect of which tolls were payable when sold in the plaintiffs' market, and for selling purposes. In one building there were a ring for showing the cattle and a rostrum, and in the open there were pens for the animals. On these premises the defendant held auction sales of animals every third Tuesday. The sales were attended by several persons who attended the plaintiffs' market, but there was no private bargaining among those who attended the sales:—

Held, on the construction of s. 42 of the private Act, which superseded s. 13 of the Act of 1847, that the defendant had not done anything which he was prohibited from doing.

Decision of Sargant J. [1915] 1 Ch. 360 affirmed. HAILSHAM CATTLE MARKET COMPANY *v.* TOLMAN – – – – **C. A. 1**

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MASTER AND SERVANT—*Contract of Service—Breach—Notice of Breach to Subsequent Employer—Continuation of Employment after Notice*

MASTER AND SERVANT—*continued.*

of Breach of Prior Contract—Harbouring—Liability of Employer.

Where a person employed under a contract of service for a term leaves his employment, and before the expiration of the term is taken into the service of another and in breach of that contract employed by him with knowledge thereof, the new employer is liable to an action at the suit of the former.

Blake v. *Lanyon* (1795) 6 T. R. 221 and *De Francesco* v. *Barnum* (1890) 63 L. T. 514 followed. FRED. WILKINS AND BROTHERS, LIMITED *v.* WEAVER – – **Joyce J. 322**

MEETINGS—Company—English company with alien enemy shareholders — Right of alien to vote at meetings — Licensed English branch of alien enemy bank—Intercourse – – – – **124**
See COMPANY. 2.

MEMORANDUM OF ASSOCIATION—Company.
See under COMPANY.

MILITARY SERVICE — Will — Soldier—Actual military service — Attestation by two witnesses — Gift to one of attesting witnesses—Validity – – **240**
See WILL. 7.

MISREPRESENTATION — Company—Prospectus—Directors—Liability—Uncorroborated statements of promoter – **21**
See COMPANY. 5.

MONEY-LENDER—*Transaction harsh and unconscionable—Excessive Interest—Interest on Interest—Payment by Instalments—Default Clause—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

The defendant, a registered money-lender, on four occasions advanced money to the plaintiff, a tradesman, upon what the defendant himself described as a fair average risk.

For the first advance of 100*l.* the plaintiff gave a promissory note for 150*l.* payable by fourteen equal monthly instalments, and after twelve of these had been duly paid the second advance of 50*l.* was made, upon the defendant's own invitation, and for this advance the plaintiff gave a bill for 65*l.* falling due three months after date. The rate of interest on the first advance was admittedly at least 72 per cent., and on the second advance 120 per cent. per annum. While the last-mentioned 65*l.* and 20*l.* of the first loan were still owing but not yet due, the defendant advanced the plaintiff 15*l.* in cash, making with the moneys so owing 100*l.*, for which the defendant gave a promissory note for 150*l.* (the extra 50*l.* representing interest) repayable by monthly instalments of 10*l.* 15*s.* After ten of these instalments had been duly paid the defendant advanced the plaintiff 150*l.* in cash and took his promissory note for 281*l.* 10*s.* repayable by instalments and made up of the 150*l.* advanced, 37*l.* 10*s.* being the money due on the last promissory note less a rebate of 5*l.*, and 94*l.*, presumably for interest.

All the promissory notes contained a proviso that upon default in payment of any instalment

MONEY-LENDER—*continued.*

the whole of the money then remaining due on the note (i.e., including both capital and unaccrued interest) should immediately become payable. The effect of the third and fourth transactions involved the payment of interest upon interest charged in respect of the balance then outstanding of the earlier loans.

After six of the instalments had been paid under the last promissory note, the plaintiff commenced this action to reopen the transactions and for an account and consequential relief :—

Held that, in the circumstances, the charges made by the defendant were exorbitant and excessive ; that the whole course of dealing with the plaintiff in respect of interest and otherwise was harsh and unconscionable within the meaning of the Money-lenders Act, 1900 ; that the plaintiff was entitled to relief ; and that in taking the account interest at the rate of 15 per cent. per annum would be allowed. HALSEY *v.* WOLFE – – – – **Joyce J. 330**

MORTGAGE—*Expectant Share as One of Next of Kin of Living Person—Assignment of, by Way of Mortgage—Definite Item of Property—Bankruptcy and Discharge of Mortgagor before Falling into Possession of Share—Effect on Mortgage—Priority.*

In 1905 L., who as one of the next of kin of his mother was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In May, 1908, he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In August, 1908, he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A. proved in the bankruptcy. In 1911 L. assigned his expectant share to the I. Syndicate. In 1914 L.'s mother died, and the share thereupon fell into possession :—

Held by the Court of Appeal, affirming the decision of Warrington J., that, notwithstanding L.'s bankruptcy, the assignments of 1905 and 1908 remained in force and operated so as to transfer his share on the death of his mother and did not merely impose upon him a personal liability which could be affected by his bankruptcy.

Held, therefore, that the N. Society and A. were entitled in priority to the I. Syndicate.

Collyer v. *Isaacs* (1881) 19 Ch. D. 342 distinguished.

Decision of Warrington J. [1915] 1 Ch. 774 affirmed. *In re* LIND. INDUSTRIALS FINANCE SYNDICATE, LIMITED *v.* LIND – **C. A. 345**

MURDER—Intestacy—Verdict of inquest that son murdered intestate—Indictment for murder — Insanity — Indictment not proceeded with — Right to share in father's estate – – – – **173**
See INTESTACY.

NAME—Trade mark—Registration—Name of incorporated company in ordinary handwriting — Representation in a "special or particular manner" – **202**
See TRADE MARK. 3.

POLICY—Insurance.
See under INSURANCE.

—— Insurance (Accident).
See under INSURANCE (ACCIDENT).

—— Insurance (Fire).
See under INSURANCE (FIRE).

—— Insurance (Life).
See under INSURANCE (LIFE).

—— Insurance (Marine).
See under INSURANCE (MARINE).

POWER OF APPOINTMENT—*Marriage Settlement—Power to Wife to appoint by Will during the Continuance of the Coverture—Will made during Husband's Lifetime—Death of Husband leaving Wife surviving—Valid Execution.*

By a marriage settlement trust funds were settled by the wife's father upon the usual trusts during the joint lives of the husband and wife and the life of the survivor, and after the death of the survivor for the children of the marriage, and in case there should be no issue of the marriage "Upon trust for such person or persons and for such interest and generally in such manner as" the wife "shall by will during the continuance of the said intended coverture direct or appoint," and in default of and subject to any such appointment upon trust for the settlor, his executors, administrators and assigns. There was no issue of the marriage. The wife made a will during the coverture whereby she appointed the settled funds. She survived her husband and died without having altered the appointment so made:—

Held, that there was no reason for implying a condition that the wife should not only make her will but should also die during the coverture; that what she had done satisfied the requirements of the deed in reference to the manner of execution of the power; and that the power had been well and validly exercised.

The decision in *In re Illingworth* [1909] 2 Ch. 297 approved. *In re* SAFFORD'S SETTLEMENT. DAVIES *v.* BURGESS – **Joyce J. 211**

2. —— *Power to A. and B. jointly by Deed and to the Survivor by Will—Joint Appointment—Reservation of Power of Revocation by Deed to Appointors and the Survivor — Subsequent Revocation and New Appointment by Survivor by Deed—Valid Revocation—Invalid Appointment.*

By a marriage settlement certain property was settled upon trust for the children of the marriage in such shares and manner as the husband and wife during their joint lives by any deed or deeds legally executed by both of them, and either with or without power of revocation and new appointment, should appoint; and in default of any such joint appointment, and so far as any such appointment should not extend, then as the survivor of them should by his or her will or codicil appoint. The husband and wife made a joint appointment by deed of the settled property with a proviso that it should be lawful for the husband and wife at any time during the joint lives or for the survivor of them during his or her life by any deed or deeds to

POWER OF APPOINTMENT—*continued.*

revoke either wholly or partially the appointment thereby made.

After the death of the husband, the wife executed a deed revoking the joint appointment and purporting to make a new appointment of the property:—

Held, that the husband and wife had power in their joint appointment to reserve to the survivor a power of revocation by deed, and that the joint appointment had been effectually revoked. *In re* WEIGHTMAN'S SETTLEMENT. ASTLE *v.* WAINWRIGHT – – **Joyce J. 205**

—— Will—Special power—Delegation—Exercise—Invalidity – – – **115**
See WILL. 3.

PREFERENCE SHAREHOLDERS—Company—Scheme of arrangement—Alteration of memorandum of association—Altering rights of preference shareholders – **439**
See COMPANY. 6.

PRESCRIPTION — Light — Easement — Enjoyment—Interruption—Tenancy of dominant tenement under person occupying servient tenement—Verbal agreement of tenancy – – – – **222**
See LIGHT.

PRINCE OF WALES' FEATHERS — Royal warrant — "Calculated to deceive"—Royal warrant holders — "Person aggrieved" – – – – **27**
See TRADE MARK. 2.

PRIORITY—Mortgage—Expectant share as one of next of kin of living person—Assignment of, by way of mortgage—Definite item of property—Bankruptcy and discharge of mortgagor before falling into possession of share—Effect on mortgage **345**
See MORTGAGE.

PROMOTER—Company—Prospectus—Misrepresentations — Directors — Liability — Reasonable ground for believing statements to be true — Uncorroborated statements of promoter – – **21**
See COMPANY. 5.

PROSPECTUS—Misrepresentations—Directors—Liability — Reasonable ground for believing statements to be true—Uncorroborated statements of promoter **21**
See COMPANY. 5.

PUBLIC POLICY—Will—Legacy to corporation—Secular Society, Limited—Objects of company — Subversive of religion — Blasphemy—Validity of gift – **447**
See WILL. 2.

PURCHASER—Vendor and
See under VENDOR AND PURCHASER.

RAILWAY GUIDE—Copyright—Compilation—Index of stations to railway guide—Monthly publication—Infringement **376**
See COPYRIGHT.

REGISTER — Rectification of register — Trade mark — Old marks—Royal warrant—Prince of Wales' Feathers—"Calculated to deceive"—Royal warrant holders—"Person aggrieved" – – – **27**
See TRADE MARK. 2.

REGISTRATION—Trade marks.
See under TRADE MARK.

RELIGION — Will — Legacy to corporation—Secular Society, Limited—Objects of company — Subversive of religion — Blasphemy—Validity of gift – **447**
See WILL. 2.

REMAINDERMAN—Tenant for life and remainderman.
See under SETTLED ESTATE.

REMUNERATION — Company — Manager — Remuneration by a percentage on annual net profits—Prior deduction of income tax – – – – **338**
See COMPANY. 4.

RENT—Company—Winding-up—Landlord and tenant—Rent payable in advance—Distress for rent before commencement of winding-up—Injunction – **404**
See COMPANY. 8.

RESIDUE—Codicil — Construction — Residuary bequest in will—Bequest in codicil of "the residue of my estate not bequeathed by the above will" – **295**
See WILL. 1.

RESTRAINT OF TRADE—*Special Branch of Engineering Business—Employer and Servant—Restraint for Seven Years extending to United Kingdom—Interests of Servant and Public.*

The plaintiffs were makers of certain special classes of lifting machinery, having their head office at Loughborough and branch offices in England, Wales, and Scotland, and having a traveller but no branch office in Ireland. They had devoted a great deal of labour to the organization of this class of business both from a manufacturing and commercial standpoint. In 1901 the defendant, being then fifteen years of age, entered the plaintiffs' employment as a junior draughtsman, and in 1906, having already attained the position of leading draughtsman, he was required, immediately after attaining the age of twenty-one years, to enter into an agreement for a like period and substantially similar to that below mentioned. In 1909 he was employed in the selling as well as the engineering department, and in 1911, on taking charge of the selling department at Loughborough and while still bound by the agreement of 1906, he entered into a written agreement with the plaintiffs whereby he agreed that he would not for seven years from the date of his ceasing to be employed by the plaintiffs either in the United Kingdom of Great Britain or Ireland be concerned in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, and hand overhead travelling cranes, or any part thereof, or be concerned or assist as aforesaid in

RESTRAINT OF TRADE—*continued.*

any business connected with such sale or manufacture. The defendant's training and experience in the plaintiffs' employment had been entirely in this branch of engineering. The defendant subsequently left the plaintiffs' employment and entered into that of a rival firm admittedly in breach of the agreement. The plaintiffs sued for an injunction. The only defence was that the agreement was in undue restraint of trade :—

Held by Sargant J., that, though from the point of view of the employers alone the agreement was not unreasonable as regarded either space or time, from the point of view of the employee and the public, if the injunction were granted, both the defendant and the public would be deprived of a great deal of the skill and experience which the defendant had acquired in the course of his training and service with the plaintiffs; that the knowledge so acquired was not knowledge of a confidential character acquired on behalf and for the benefit of the plaintiffs, but was part of the general mental equipment of the defendant, and that the agreement was therefore in undue restraint of trade and void.

In determining the question of the reasonableness of a restrictive covenant between employer and employee the interests of the employer are not the only element to be considered, but there must also be taken into account the oppressiveness of the restriction on the employee, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered :—

Held by the Court of Appeal (Lord Cozens-Hardy M.R. and Joyce J., Phillimore L.J. dissenting), affirming the decision of Sargant J., that although the agreement might be of some advantage to the plaintiffs in restraining competition, yet when regarded from the point of view of the defendant and of the public in general, it was not reasonable and ought not to be enforced.

Semble, that it was wholly unreasonable to require an employee immediately upon attaining the age of twenty-one years to enter into such an agreement. HERBERT MORRIS, LIMITED *v.* SAXELBY – – – – – **C. A. 57**

RESTRAINT ON ANTICIPATION—Election—Compensation—Spinster – – **283**
See ELECTION.

RETAINER — Administration — Trustee in default — Set-off or retainer — Legacy under will—Derivative title – **480**
See ADMINISTRATION. 3.

REVENUE — *Licensed Premises — Increase of Duty — Apportionment — Lease — Liability of Grantor to pay Proportion of Increased Duty —"Grantor of Lease"—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46—*Finance Act*, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where the licensed premises are held under a lease made before the passing of the Finance Act, 1910, which does not contain any covenant on the part of the lessee to obtain a supply of

REVENUE—*continued.*

intoxicating liquor from the grantor of the lease, the lessee under such lease shall be entitled to recover as a debt due from the grantor of the lease a proportion of any increase of duty payable in respect of the licence under the provisions of the Finance Act, 1910.

The defendant, under an arrangement with certain co-adventurers who were interested in obtaining for the plaintiff company a lease of certain licensed premises, advanced moneys to enable the property to be purchased and took a conveyance of the property to himself in order to secure the repayment of his advances. In 1892, in pursuance of the arrangement, he granted a lease of the premises to the plaintiff company in consideration of a rent and premium, and without any tie or obligation on the part of the company to purchase intoxicants from him. The defendant's advances having shortly afterwards been paid off, he assigned the reversion on the lease to nominees of the co-adventurers, and so ceased to have any interest in the property. In an action by the company to recover from the defendant a proportion of the increased licence duty payable in respect of the premises under the Finance (1909-10) Act, 1910 :—

Held, reversing the decision of Astbury J., that the defendant, being the person who had under his hand and seal created the term of years in the demised premises, was the "grantor of the lease" within the meaning of s. 2 of the Finance Act, 1912, and as such was liable to pay to the company the proportion of the increased licence duty.

Bodega Co. v. *Read* [1914] 2 Ch. 757 followed.
BODEGA COMPANY *v.* MARTIN – **C. A. 385**

—— Administration—Different rates of duty—Legacy duty on life interest — Duty wrongly paid out of capital of legacy by executors beneficially entitled—Recoupment by tenant for life – – **96**
See ADMINISTRATION. 1.

—— Estate duty — Incidence of — Will—Construction — Devise of real estate in Ireland—Irish Land Acts—Conversion
See IRELAND. **264**

—— Settled legacy—"Free of all duty"—Estate duty—Legacy duty—New duty imposed by statute after death of testatrix—Incidence of duties as between settled legacy and general estate – **179**
See WILL. 5.

REVOCATION—Power of appointment – **205**
See POWER OF APPOINTMENT. 2.

ROYAL WARRANT—Trade mark—Rectification of register — Old marks — Prince of Wales' Feathers — "Calculated to deceive" — Royal warrant holders — "Person aggrieved" – – **27**
See TRADE MARK. 2.

RULES OF THE SUPREME COURT, 1883, ORDER LXV. (Costs), r. 27, sub-r. 38B
See COSTS. **474**

SCHEME OF ARRANGEMENT — Company—Alteration of memorandum of association—Altering rights of preference shareholders – – – – **439**
See COMPANY. 6.

SCHOOL — Will — Charitable gifts—Validity—Gift to governing body of school for building fives courts — Gift to headmaster for prize in school athletic sports – – – – – **284**
See CHARITY.

SECULAR SOCIETY, LIMITED — Will—Legacy to corporation—Objects of company—Subversive of religion — Blasphemy—Public policy—Validity of gift – **447**
See WILL. 2.

SERVANT—Employer and servant—Restraint of trade—Special branch of engineering business — Restraint for seven years extending to United Kingdom—Interests of servant and public – **57**
See RESTRAINT OF TRADE.

—— Master and.
See under MASTER AND SERVANT.

SET-OFF—Administration—Trustee in default—Set-off or retainer—Legacy under will —Derivative title – – – **480**
See ADMINISTRATION. 3.

SETTLED ESTATE—Annuities—Charge upon realty and personalty—Insufficiency of income—Deficiency paid out of corpus —Recoupment—Tenant for life and remainderman – – – – **290**
See WILL. 6.

SETTLED LAND—*Equitable Tenant for Life and Remaindermen—Freehold Houses let on Long Repairing Leases at Ground Rents—Power of Management in Trustees—Trustees' Costs of Management—Costs of Survey for Repairs and of serving Notices to repair—Power of Court to direct such Costs to be paid out of Capital—"Proceedings proposed to be taken for protection of settled land"—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 36.

A testator, who died in 1891, devised a freehold estate to trustees upon trust to permit his wife to receive the rents, profits, and income thereof during her life, and after her death upon trust for the remaindermen therein named. The testator empowered his trustees to manage the said estate and to pay the "costs of management out of the rents and profits." The estate consisted of 650 houses let upon long building leases at ground rents amounting to 2100*l.* a year. In 1913 the trustees incurred costs of upwards of 1100*l.* in having the estate surveyed and in serving notices with schedules of repairs required on the tenants with a view to proceedings for enforcing their covenants to repair :—

Held, that the Court had power to direct these costs to be paid out of capital under the Settled Land Act, 1882, s. 36, as being "costs of

SETTLED LAND—*continued.*

proceedings" proposed to be taken for the protection of settled land.

Decision of Neville J. ([1915] 1 Ch. 540) approved as to the construction of the will, but reversed on the ground (not taken before him) that the Court had power under the Settled Land Act to allow the costs out of capital notwithstanding the will. *In re* TUBBS. DYKES *v.* TUBBS – – – – – – **C. A. 137**

SETTLEMENT—Annuities—Charge upon realty and personalty—Insufficiency of income—Tenant for life and remainderman – – – – – – **290**
See WILL. 6.

—— Deed, Construction of—Settlement to the use of trustees and their heirs—Appointment of "trust funds and property" without words of limitation—Intention to be found in document—Absolute interest – – – – – – **431**
See DEED.

—— Power of appointment.
See under POWER OF APPOINTMENT.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SOLDIER—Actual military service—Attestation by two witnesses—Gift to one of attesting witnesses—Validity – – **240**
See WILL. 7.

SPECIFIC PERFORMANCE — Company— Contract by which a shareholder has power to nominate a director—Article of association to same effect—Power of company to alter article – – **186**
See COMPANY. 1.

SPINSTER — Election — Compensation — Restraint on anticipation – – **283**
See ELECTION.

STATUTES:—

1601.

43 Eliz. c. 4 – – – – – – **284**
See CHARITY.

1697.

9 Will. 3, c. 35—*Blasphemy* – – **447**
See WILL. 2.

1832.

2 & 3 Will. 4, c. 7, ss. 3, 4—*Prescription* **222**
See LIGHT.

1837.

1 Vict. c. 26, ss. 11, 15—*Wills* – – **240**
See WILL. 7.

1842.

5 & 6 Vict. c. 35, s. 54—*Income Tax* – **338**
See COMPANY. 4.

STATUTES—*continued.*

1845.

8 & 9 Vict. c. 18, s. 63—*Lands Clauses Consolidation* – – – – **252**
See VENDOR AND PURCHASER.

1847.

10 & 11 Vict. c. 14, s. 13—*Markets and Fairs Clauses* – – – – – **1**
See MARKET.

1878.

41 & 42 Vict. c. 14, ss. 5, 6, 7, 8—*Baths and Washhouses* – – – – **154**
See CINEMATOGRAPH.

1882.

45 & 46 Vict. c. 38, s. 36—*Settled Land* – **137**
See SETTLED LAND.

1883.

46 & 47 Vict. c. 38, s. 2—*Trial of Lunatics* **173**
See INTESTACY.

1894.

57 & 58 Vict. c. 30, s. 5, sub-ss. 1, 2—*Finance* **179**
See WILL. 5.

—— —— s. 8, sub-s. 4; s. 9, sub-ss. 1, 5 – **264**
See IRELAND.

1896.

59 & 60 Vict. c. 47, s. 31, sub-ss. 1, 8—*Land Law (Ireland)* – – – **264**
See IRELAND.

59 & 60 Vict. c. 59, s. 2—*Baths and Washhouses* – – – – – **154**
See CINEMATOGRAPH.

1900.

63 & 64 Vict. c. 51, s. 1—*Money-lenders* – **330**
See MONEY-LENDER.

1903.

3 Edw. 7, c. 37, s. 16—*Irish Land* – **264**
See IRELAND.

1905.

5 Edw. 7, c. 15, ss. 3, 9, 15—*Trade Marks* **307**
See TRADE MARK. 1.

—— —— s. 9 – – – – – **202**
See TRADE MARK. 3.

—— —— ss. 11, 35, 39, 41, 68 – – **27**
See TRADE MARK. 2.

1906.

6 Edw. 7, c. 41, ss. 1—4, 23, 30, 53, 65, 66—*Marine Insurance* – – – **12**
See INSURANCE.

1908.

8 Edw. 7, c. 69, s. 13—*Companies (Consolidation)* – – – – – **186**
See COMPANY. 1.

—— —— ss. 45, 120 – – – **439**
See COMPANY. 6.

—— —— s. 84, sub-s. 1 (*a*) – – **21**
See COMPANY. 5.

STATUTES—*continued.*

1909.

9 Edw. 7, c. 49, ss. 1, 17, 28; Scheds. VI., VIII.—*Assurance Companies* – 12
See INSURANCE.

1910.

10 Edw. 7, c. 8, s. 46—*Finance* (1909-10) 385
See REVENUE.

1911.

1 & 2 Geo. 5, c. 46, ss. 1, 2, 7, 35—*Copyright*
See COPYRIGHT. 376

1912.

2 & 3 Geo. 5, c. 8, s. 2—*Finance* – 385
See REVENUE.

1914.

4 & 5 Geo. 5, c. 10, s. 14—*Finance* – 179
See WILL. 5.

4 & 5 Geo. 5, c. 59, s. 130, sub-s. 3—*Bankruptcy*
See ADMINISTRATION. 2. 198

4 & 5 Geo. 5, c. 87, s. 1—*Trading with the Enemy* – – – – – 409
See WAR.

—— —— s. 1, sub-s. 2 – – – 124
See COMPANY. 2.

5 Geo. 5, c. 12, s. 1—*Trading with the Enemy Amendment* – – – – 409
See WAR.

—— —— s. 4, sub-s. 1 – – – 313
See TRADING WITH THE ENEMY.

1915.

5 & 6 Geo. 5, c. 79, s. 2—*Trading with the Enemy Amendment* – – 409
See WAR.

STREETS—Compulsory purchase—Street widening—Arbitration — Award — Construction — Alternative findings — Test of value – – – – – 252
See VENDOR AND PURCHASER.

SUBSTITUTION — Will — Construction — Real estate—Devise to A. "or his issue"—Estate tail—Words of limitation not of substitution – – – – 301
See WILL. 4.

SUBSTITUTIONAL GIFT—Will — Construction —Children "shall be paid" parent's share—Joint tenancy or tenancy in common – – – – – 216
See WILL. 8.

SURPLUS ASSETS—Company—Winding-up — Insolvent shareholder indebted to company—Executors' right to share in surplus assets subject to setting off the dividend only on the debt – – 442
See COMPANY. 7.

SWIMMING BATH — Closing during winter months — Letting for cinematograph entertainments – – – – 154
See CINEMATOGRAPH.

TAXATION—Costs.
See under COSTS.

TENANCY IN COMMON—Joint tenancy or— Will — Construction — Substitutional gift — Children "shall be paid" parent's share – – – – 216
See WILL. 8.

TENANT FOR LIFE—Administration—Bequest to special trustees of legacy settled on persons in succession—Different rates of duty—Legacy duty on life interest—Duty wrongly paid out of capital of legacy by executors beneficially entitled —Recoupment by tenant for life – 96
See ADMINISTRATION. 1.

—— Settled land.
See under SETTLED LAND.

—— Settlement — Annuities — Charge upon realty and personalty — Insufficiency of income—Tenant for life and remainderman – – – – – 290
See WILL. 6.

—— Tenant for life and remainderman—Will— Conversion—Unauthorized investment held at testator's death — Right of tenant for life to income in specie 437
See WILL. 9.

TITLE—Derivative title—Trustee in default— Set-off or retainer — Legacy under will – – – – – – 480
See ADMINISTRATION. 3.

TRADE—Restraint of trade.
See under RESTRAINT OF TRADE.

TRADE MARK—*Label — Disclaimer — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 15.

The discretion conferred on the registrar or the Court by s. 15 of the Trade Marks Act, 1905, to require a disclaimer of any right to the exclusive use of any part or parts of a trade mark should not be exercised so as to place upon the register disclaimers which are unnecessary in law.

The applicants applied to register as a trade mark a label consisting of a wreath of five Tudor roses enclosing the words "Tudor Chocolates made by Cadbury," the word "Tudor" being the most prominent word. The registrar refused the application except on the condition of the applicants disclaiming any right to the exclusive use of the word "Tudor," stating as his reason that of recent years it had been the practice of the Office in every case where a prominent feature of a mark was a word which could not be registered alone to insist that a disclaimer of that word be put in so as to make the position clear commercially as well as legally:—

Held, that the registrar was wrong in acting on any such general rule of practice, and that the registration in the present case ought to proceed without insisting on any disclaimer.

In re Albert Baker & Co.'s Application [1908] 2 Ch. 86 followed. *In re* CADBURY BROTHERS' APPLICATION – **Sargant J. 307**

TRADE MARK—*continued.*

2. —— *Rectification of Register—Old Marks—Royal Warrant—Prince of Wales' Feathers—"Calculated to deceive"—Royal Warrant Holders—"Person aggrieved"—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 35, 39, 41, 68—*Trade Marks Rules*, 1906, *r.* 12.

A tobacco company was the registered owner of three trade marks for manufactured tobacco consisting, in part, of the Prince of Wales' feathers. The marks had been continuously used by the company and their predecessors in title for a long series of years in connection with the sale of tobacco, and were all registered as old marks prior to 1905. No Royal warrant had been granted to the company for the right to use the feathers, nor, when a motion to expunge the marks was launched, were there any persons holding warrants from the present or any former Prince of Wales. Upon a motion by the Royal Warrant Holders' Association under s. 35 of the Trade Marks Act, 1905, to have these three marks expunged from the register on the ground that they were contrary to law and calculated to deceive within the meaning of s. 11 of the Trade Marks Act, 1905:—

Held, on the evidence, by the Court of Appeal, affirming the decision of Eve J., that the applicants had not established that the marks were calculated to induce the belief that the respondents held a Royal warrant, but even if they had been, s. 11 of the Act had no application to marks which were in no sense contrary to law when registered, and the use of which at the present time was identical with that which had obtained ever since they were registered. The mere fact that the marks contained matter now no longer registrable did not supply any reliable criterion for determining whether they were contrary to law, or for measuring their alleged deceptive qualities.

Held, further, by Eve J. (but not decided by the Court of Appeal), that the applicants were not "persons aggrieved" within s. 35 of the Act. *In re* IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND), LIMITED'S TRADE MARKS – – – – **C. A. 27**

3. —— *Registration—Name of Incorporated Company in Ordinary Handwriting—Representation in a "special or particular manner"—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9.

The name of an unincorporated company is not "represented in a special or particular manner" within the meaning of s. 9 of the Trade Marks Act, 1905, by the fact that it is written, like a signature, in more or less ordinary handwriting, and is not, when so written, registrable as a trade mark. *In re* BRITISH MILK PRODUCTS COMPANY'S APPLICATION **Sargant J. 202**

TRADE MARKS RULES, 1906, r. 12 – **27**
See TRADE MARK. 2.

TRADING WITH THE ENEMY—*Enemy Property—Policies of Life Assurance deposited with Enemy as Security—Policies out of Jurisdiction—Application to vest Policies or Right to receive Policy Moneys in Custodian—Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 4, *sub-s.* 1.

An English firm consisting of two partners deposited with one R., an alien enemy resident in Germany, certain policies of assurance on the respective lives of the partners as security for certain bills which he had accepted on their behalf. The firm subsequently became bankrupt. One of the partners having died and the policy moneys under two of the policies having thereupon become payable, the trustee in the bankruptcy applied under s. 4 of the Trading with the Enemy Amendment Act, 1914, for an order vesting in the custodian the two policies, or in the alternative the right to receive the policy moneys thereunder:—

Held, that under the Act the only property which could be vested in the custodian was enemy property; that the charge on the policies was enemy property, but that the applicant was not interested in it, and consequently that the application must be dismissed. *In re* RUBEN **Younger J. 313**

—— Company incorporated in Belgium—Right to sue in English Courts—"Enemy"—"Enemy country"—Territory in hostile occupation – – – **409**
See WAR.

TRADING WITH THE ENEMY ACT, 1914, s. 1, sub-s. 2 – – – – – **124**
See COMPANY. 2.

TRADING WITH THE ENEMY PROCLAMATION No. 2 (Sept. 9, 1914), clauses 2, 3
See WAR. **409**

—— Clause 6 – – – – – – **124**
See COMPANY. 2.

TRADING WITH THE ENEMY (OCCUPIED TERRITORY) PROCLAMATION (Feb. 16, 1915) – – – – **409**
See WAR.

TRANSACTION HARSH AND UNCONSCIONABLE — Money-lender — Excessive interest—Interest on interest—Payment by instalments—Default clause – **330**
See MONEY-LENDER.

TRANSFER—Administration—Insolvent estate—Transfer from Chancery Division to Court of Bankruptcy – – – **198**
See ADMINISTRATION. 2.

TRIAL OF LUNATICS ACT, 1883, s. 2 – **173**
See INTESTACY.

TRUSTEE—Administration—Bequest to special trustees of legacy settled on persons in succession—Different rates of duty—Legacy duty on life interest—Duty wrongly paid out of capital of legacy by executors beneficially entitled—Recoupment by tenant for life – **96**
See ADMINISTRATION. 1.

TRUSTEE—*continued.*

—— Administration—Trustee in default—Set-off or retainer—Legacy under will—Derivative title— – – – – **480**
See ADMINISTRATION. 3.

—— Conversion—Deed of family arrangement—Conveyance of freeholds to trustees—Trust to sell upon request in writing of settlors—Trust of rents and profits until sale of settlors, their heirs, executors, administrators and assigns—Death of one of settlors intestate—No request to sell in lifetime—Freeholds, whether converted into money – – **106**
See CONVERSION.

—— Costs—Taxation—Plaintiff's solicitors' bill reduced by one-sixth—"Fund or estate (real or personal)"—Action for indemnity by trustee – – – **474**
See COSTS.

—— Costs—Trustees' costs of management—Settled land—Equitable tenant for life and remainderman—Freehold houses let on long repairing leases at ground rents—Costs of survey for repairs and serving notices to repair– – – – **137**
See SETTLED LAND.

VENDOR AND PURCHASER—*Compulsory Purchase—Street Widening—Arbitration—Award—Construction — Alternative Findings — Test of Value—Increment Value on taking of Frontage Strip—Betterment—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

Where an owner of two contiguous pieces of land forming an area suitable, and it may be best suited, for development and use as one building site sells under compulsion a part of one piece as a part of that piece and without any reference to his interest in the other piece, the purchase price for the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece, and is not to be ascertained by deducting the value of what is left to the owner of the two pieces after the sale from their aggregate value immediately prior to the sale.

A railway company which was seised in fee of property in London bounded on the north by the Strand and on the east by Craven Street received notice to treat for a portion of this property from the London County Council for the purpose of widening the street. By a contract made in 1912, which superseded this notice, the company agreed to sell to the Council a piece of land forming parts of Nos. 9 and 10, West Strand, at the back of which were Nos. 1 to 7, Craven Street. The Council covenanted to execute all necessary road making so as to give the remainder of Nos. 9 and 10, Strand a frontage to the Strand as widened. The purchase-money and compensation were to be determined by an arbitrator, and by his award he awarded the sum of 18,330*l.* by way of purchase-money, and nothing beyond for compensation. By way of addenda he declared that in arriving at this sum he had had regard solely to the value of

VENDOR AND PURCHASER—*continued.*

the estate and interest in the said land contracted to be sold, but that if the true measure of the purchase-money and compensation were the difference between the value of the Strand and Craven Street land before the giving of the notice and the aggregate value of the said lands after the taking of the frontage strip, he found that the amount of purchase-money and compensation would be 3465*l.* In an action by the vendors for the specific performance of the agreement:—

Held by Eve J. and the Court of Appeal, that the contract being one for the sale and purchase of a part of the vendors' property known as Nos. 9 and 10, Strand, and not a contract for the sale of a part of the entire site, the arbitrator was justified in treating the vendors as though they were the owners of Nos. 9 and 10 only, and there must be judgment for specific performance of the agreement on the footing that 18,330*l.* was the purchase price. *In re* SOUTH EASTERN RAILWAY COMPANY AND LONDON COUNTY COUNCIL'S CONTRACT. SOUTH EASTERN RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL – – – – **C. A. 252**

WAR—*Trading with Enemy—Company incorporated in Belgium—Right to sue in English Courts—"Enemy"—"Enemy Country"—Territory in Hostile Occupation—Trading with the Enemy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 87), *s.* 1—*Trading with the Enemy Amendment Act*, 1914 (5 & 6 *Geo.* 5, *c.* 12), *s.* 1—*Trading with the Enemy Amendment Act*, 1915 (5 & 6 *Geo.* 5, *c.* 79), *s.* 2—*Trading with the Enemy Proclamation No.* 2 (*Sept.* 9, 1914), *clauses* 2, 3—*Trading with the Enemy* (*Occupied Territory*) *Proclamation* (*Feb.* 16, 1915).

By the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2, it is rendered illegal during the war to trade with the enemy, i.e., to do any act prohibited by proclamation. By a Proclamation dated September 9, 1914, clause 3, the expression "enemy" in this Proclamation means "any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." By the same Proclamation the expression "enemy country" means "the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof."

By the Trading with the Enemy Amendment Act, 1914 (5 & 6 Geo. 5, c. 12), a custodian trustee was appointed, to whom any person holding or managing property for or on behalf of an enemy is bound to make a return of such property; and by the preamble to that Act, "enemies" are defined as being "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war."

By a Proclamation dated February 16, 1915, it was provided (clause 1): "The proclamations

WAR—*continued.*

for the time being in force relating to trading with the enemy shall apply to . . . . territory in hostile occupation as they apply to an enemy country."

By the Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. 5, c. 79), s. 2, the provision of the principal Act (i.e., 5 & 6 Geo. 5, c. 12) requiring returns to be made to the custodian trustee was extended to balances and deposits standing to the credit of enemies at any bank.

The plaintiff company was incorporated under the laws of Belgium and had its registered office at Antwerp. After the outbreak of war between Great Britain and her Allies (including Belgium) and Germany, a large portion of Belgium (including Antwerp) being in the effective military occupation of Germany, the company's business at Antwerp was closed, and the books were removed to London, where the business was now wholly carried on, but the chairman of the company was still in Antwerp. The defendants, who acted as bankers for the company, had declined to pay a cheque drawn upon them by the company on the ground that the company was "technically an enemy"; and they proposed to make a return to the custodian trustee of the moneys held by them on the company's behalf. In an action by the company for a declaration that it was not an enemy within the meaning of the Trading with the Enemy Acts and the Proclamations relating to trading with the enemy, and an injunction to restrain the defendants from making any return to the custodian trustee of any property in their possession or under their control to which the company was entitled:—

Held by Younger J., (1.) that the company was not an enemy of the King at common law and was therefore entitled to sue; (2.) that the company must for the purpose of the Proclamation of September 9, 1914, be treated as an "enemy" within the Proclamation of February 16, 1915, and could not therefore successfully demand payment of the cheque; and (3.) that the company was not an "enemy" within the Trading with the Enemy Act, 1914, or the Trading with the Enemy Amendment Act, 1915, and that the defendants must therefore be restrained from making a return to the custodian trustee.

Held by the Court of Appeal, that the company being incorporated in Belgium was not incorporated in an enemy country, for although a large portion of that country was in the effective military occupation of an enemy, yet the country as a whole was not territory in hostile occupation. The company was not an "enemy" within the meaning of any of the Acts or Proclamations.

Decision of Younger J. varied. SOCIÉTÉ ANONYME BELGE DES MINES D'ALJUSTREL (PORTUGAL) *v.* ANGLO-BELGIAN AGENCY, LIMITED – – – – – **C. A. 409**

WILL—*Codicil—Construction—Residuary Bequest in Will—Bequest in Codicil of "the residue of my estate not bequeathed by the above will."*

A clear unambiguous gift in a will can be revoked by codicil only by words at least equally clear and unambiguous as those of the original gift.

The rule stated in *Hearle* v. *Hicks* (1882) 1 Cl. & F. 20, 24, followed.

Earl of Hardwicke v. *Douglas* (1840) 7 Cl. & F. 795 discussed.

A testator, after making numerous specific and pecuniary bequests and devising certain lands for charitable purposes, devised and bequeathed all his real and personal estate, not thereby otherwise disposed of, to his trustees upon trust to sell, and, after certain payments therein directed, to hold the residue and the income in trust, as to one third, for the Society for Promoting Christian Knowledge, and as to the other two thirds for the vicar of I. for purposes connected with his church. On February 17, 1915, the testator made a codicil, in which, after referring to his will, he continued: "The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock . . . . absolutely, and I appoint her sole executrix of this codicil." The testator died on February 27, 1915:—

Held, that what passed under the bequest in the codicil was such portion (if any) of the residue as might ultimately turn out not to have been effectually disposed of by the will. *In re* STOODLEY. HOOSON *v.* LOCOCK – **Eve J. 295**

2. —— *Legacy to Corporation — Secular Society, Limited—Objects of Company—Subversive of Religion—Blasphemy—Public Policy—Validity of Gift—Blasphemy Act*, 1697 (9 *Will.* 3, *c.* 35).

A testator gave his real and personal estate upon trust, after the death of his wife, for sale and conversion, and then, subject to the payment of certain legacies and the provision for certain annuities out of the proceeds of such sale and conversion, "upon trust for the Secular Society, Limited."

The Secular Society, Limited, was a company limited by guarantee and registered under the Companies Acts. The main objects of the company, as stated in its memorandum, were, inter alia, (*a*) "to promote . . . . the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."

The articles of association provided that all moneys received by the society should be applied solely in carrying out its objects, and that no portion of its income should be paid by way of dividend, bonus, or otherwise by way of profit to any member, and that upon the winding up or dissolution of the society the surplus assets should not be paid or distributed among the members, but should be given to some other kindred society or non-sectarian charity:—

Held, that there was nothing necessarily illegal in the objects of the society as stated in the memorandum of association. They might be given effect to without incurring liability to indictment for blasphemy either under the Blasphemy Act or at common law, and they were not of such a character as that the Court

was bound to refuse to aid the society in its claim to the legacy. No question of perpetuity arose, and the gift was consequently valid.

Per Warrington L.J.: A gift cannot properly be held invalid on the ground that it is given for a purpose which may be contrary to ecclesiastical law but is not otherwise illegal.

Decision of Joyce J. affirmed.

Briggs v. *Hartley* (1850) 19 L. J. (Ch.) 416 and *Cowan* v. *Milbourn* (1867) L. R. 2 Ex. 230 overruled. *In re* BOWMAN. SECULAR SOCIETY, LIMITED *v.* BOWMAN – – – **C. A. 447**

3. —— *Power of Appointment — Special Power—Delegation—Exercise—Invalidity.*

A testator gave a sum of money to trustees upon trust to pay the income to his daughter for life and after her decease as to the principal in trust for her issue born in her lifetime "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint, and in default of appointment for all her children equally. The daughter, in exercise of the power, by her will appointed the trust fund among all her children who should survive her and being male attain twenty-one or being female attain that age or marry under it; and she declared that during the period of twenty-one years from her death the income of each child's share should be paid to the child, and if the child should die within the period of twenty-one years the child should have a power of appointment by will, and subject thereto in the event of the child leaving issue in trust for such child absolutely, but in the event of the child leaving no issue then the share was to go by way of accruer to the other shares. If the child should survive the period of twenty-one years the child was to take absolutely: "provided always that the said trustees" (of the testator's will) "shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely":—

Held, that the power conferred upon the trustees by the proviso was an attempt to delegate the power given by the testator to his daughter and was therefore an invalid exercise of that power.

Decision of Joyce J. affirmed. *In re* JOICEY. JOICEY *v.* ELLIOT – – – **C. A. 115**

4. —— *Real Estate—Devise to A. "or his issue"—Estate Tail—Words of Limitation not of Substitution—Will—Construction.*

By his will a testator, who died in 1870, gave certain lands to be possessed by his son H. for his life, and on his death to revert to his issue in such proportions as he by his last will might direct, "and in default of such issue him surviving, then to revert to his brother, Shadwell Henry Clerke, or his issue."

H. died without issue in 1914, his brother S. H. C. having predeceased him leaving three children, and one of those children had three children living at the date of H.'s death. By his will S. H. C. purported to dispose of the realty in question:—

Held, that the devise to S. H. C. or his issue gave him an estate tail, the words being words of limitation and not of substitution. *In re* CLERKE. CLOWES *v.* CLERKE – **Eve J. 301**

5. —— *Settled Legacy—"Free of all duty"—Estate Duty—Legacy Duty—New Duty imposed by Statute after Death of Testatrix—Incidence of Duties as between Settled Legacy and General Estate—Will—Construction—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-ss.* 1, 2—*Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

By a codicil to her will made in July, 1911, a testatrix bequeathed to her trustees the sum of 6000*l.* "free of all duty," to be held upon trust for her niece, D. H., for life, and after her death for her children, with a gift over to certain charitable institutions in the event of no child of the niece attaining a vested interest. At the respective dates of the will and codicil and of the death of the testatrix in January, 1913, this settled legacy was by virtue of the Finance Act, 1894, relieved from the payment of estate duty on the death of the niece; but by s. 14 of the Finance Act, 1914, which came into operation on July 31, 1914, this relief was abolished in the case of any person dying after August 15, 1914. The niece was still living and a spinster, and estate duty would be payable on her death, as well as legacy duty. Upon a summons by the trustees of the settled legacy asking whether they ought to set aside, out of the assets of the testatrix, any sums to meet the estate duty and the legacy duty, or whether both or either were payable out of the legacy:—

Held, on the question of construction of the gift "free of all duty," that the legacy duty was payable out of the general estate, according to *In re Turnbull* [1905] 1 Ch. 726.

But *held*, that the operation of the gift must be determined, with reference to the duties imposed in respect of the legacy, at the date of the death, and ought not to be extended to duties imposed by the Legislature subsequent to that date, and the estate duty was accordingly payable out of the legacy, and not out of the general estate. *In re* SNAPE. ELAM *v.* PHILLIPS – – – – – **Eve J. 179**

6. —— *Settlement—Annuities—Charge upon Realty and Personalty—Insufficiency of Income—Deficiency paid out of Corpus—Recoupment—Tenant for Life and Remainderman.*

A testator bequeathed three annuities charged upon the income and corpus of his residuary estate. The whole of his estate was settled in strict settlement upon his son and grandson. The income was insufficient to keep down the annuities, and 19*l.* 4*s.* 7*d.* was raised out of capital to satisfy the annuity of the first annuitant, who died in 1911. Sums amounting to 32*l.* 3*s.* 10*d.* had also been paid out of capital to the two surviving annuitants. It was now anticipated that there would be surplus income

WILL—*continued.*

in the hands of the tenant for life after satisfying the annuities. On a summons by the trustees of the will to ascertain whether this income should be applied in recouping to capital the sums raised thereout, or either of them :—

Held, that, having regard to the decision in *Prince* v. *Cooper* (1853) 17 Beav. 187, and to the fact that the annuities were charged upon capital as well as income, the tenant for life could not be called upon to replace the deficiency raised out of capital. *In re* CROXON. FERRERS *v.* CROXTON – – – – – **Eve J. 290**

7. —— *Soldier—Actual Military Service—Attestation by Two Witnesses—Gift to one of Attesting Witnesses—Validity—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 11, 15.

Sect. 15 of the Wills Act, 1837, does not apply to a will made in exercise of the privilege reserved to soldiers and seamen under s. 11 of the same Act.

On the conclusion of the Waziristan operations on the frontier of India in 1895 a portion of the force remained in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier. The testator was a lieutenant in an Indian regiment forming part of this escort. While so serving the testator was mortally wounded by a fanatic and was carried into camp, where he dictated a will to his brother-in-law, whom he made his residuary legatee, and died on the next day. The will was signed by the testator and attested by his brother-in-law and another officer as witnesses. His estate consisted of personal property only :—

Held, that the testator was in "actual military service" within the meaning of s. 11 of the Wills Act, 1837, at the time when he made his will.

Held, also, that notwithstanding the attestation by two witnesses the will was a soldier's will made in exercise of the privilege reserved by s. 11 and requiring no attestation ; that s. 15 of the Wills Act did not apply to a will so made ; and that the gift to the attesting witness was therefore valid. *In re* LIMOND. LIMOND *v.* CUNLIFFE – – – – **Sargant J. 240**

8. —— *Substitutional Gift—Children "shall be paid" Parent's Share—Joint Tenancy or Tenancy in Common—Will—Construction.*

Testator, after bequeathing leaseholds on trust to pay the rents to his grandson for life and on his death to sell and pay the proceeds to and amongst his nephews and nieces as tenants in common, directed that in case of the death of any of his nephews and nieces the children of the one dying should "be paid" the parent's share :—

Held, that the children took as joint tenants and not as tenants in common.

Dictum of North J. in *In re Atkinson* [1892] 3 Ch. 52, at p. 54—to the effect that if money is to "be paid" to several persons who take an absolute interest they must take as tenants in common—considered and not followed. *In re* CLARKSON. PUBLIC TRUSTEE *v.* CLARKSON **Eve J. 216**

WILL—*continued.*

9. —— *Tenant for Life and Remainderman—Rule in* Howe *v.* Earl of Dartmouth (1802) 7 *Ves.* 137, *n.—Powers to convert, postpone Conversion, and invest all subject to Consent of Tenant for Life—Unauthorized Investments held at Testator's Death—Right of Tenant for Life to Income in Specie.*

R. by will gave all his residuary estate to the Public Trustee upon trust, with the consent of his wife, to sell and convert, with power, with the like consent, to postpone sale and conversion for such time as he should think fit, and to hold the proceeds upon trust, with such consent as aforesaid, to invest the same upon specified investments and to pay the income to his wife during her life.

The testator's estate comprised investments not authorized by his will, which produced a larger income than 4 per cent. :—

Held, that as both conversion and postponement of conversion were subject to the wife's consent, her position was the same as if conversion was postponed by the will until after her death, and she was entitled to the income in specie. *In re* ROGERS. PUBLIC TRUSTEE *v.* ROGERS – – – – **Neville J. 437**

—— Administration.
See under ADMINISTRATION.

—— Charitable gifts—Validity—Gift to governing body of school for building fives courts—Gift to headmaster for prize in school athletic sports – – – **284**
See CHARITY.

—— Devise of real estate in Ireland—Irish Land Acts—Conversion—Incidence of estate duty – – – – – **264**
See IRELAND.

—— Power of appointment.
See under POWER OF APPOINTMENT.

WINDING-UP—Company.
See under COMPANY.

—— Insurance company—Winding-up order—Subsequent fire—Total loss—Rights of assured – – – – – **12**
See INSURANCE.

WITNESS—Will—Soldier—Actual military service—Attestation by two witnesses—Gift to one of attesting witnesses—Validity – – – – – **240**
See WILL. 7.

WORDS :—

—— "Actual military service" – – **240**
See WILL. 7.

—— "Calculated to deceive" – – – **27**
See TRADE MARK. 2.

—— "free of all Duty" – – – – **179**
See WILL. 5.

WORDS—*continued.*

—— "Enemy" – – – – – – 409
See WAR.

—— "Enemy country" – – – – 409
See WAR.

—— "Fund or estate (real or personal)" – 474
See COSTS.

WORDS—*continued.*

—— "Grantor of lease" – – – 385
See REVENUE.

—— "or his Issue" – – – – 301
See WILL. 4.

—— "Person aggrieved" – – – 27
See TRADE MARK. 2.

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